Comments of
NATIONAL CONSUMER LAW CENTER
on behalf of its Low Income Clients

CONSUMERS FOR AUTO RELIABILITY AND SAFETY

NATIONAL ASSOCIATION OF CONSUMER ADVOCATES
and
CENTER FOR RESPONSIBLE LENDING
on
Federal Trade Commission
Magnuson-Moss Warranty Act Review,
16 CFR Part 700, P11406
76 Fed. Reg. 52596 (Aug. 23, 2011)

Submitted Oct. 24, 2011

Thank you for the opportunity to comment on the FTC's review of its Magnuson-Moss Warranty Act (the "Act") Rules and Interpretations. We confine our comments to six topics:

- § 700.3(c) FTC should clarify that the Act applies to consumer leases
- § 700.10(b) Certain 50/50 warranties should be interpreted as violating the Act's anti-tying provision
- § 700.11(a) FTC interpretation of Act's application to insurance contracts conflicts with a federal statute and Supreme Court precedent
- § 700.11(c) FTC should clarify meaning of "entering into" a service contract
- Part 701 FTC should issue a rule on service contract disclosures
- § 703.5(j) FTC should retain its prohibition of mandatory arbitration of written warranty disputes

Organizations Submitting This Comment

The National Consumer Law Center, Inc. (NCLC) is a non-profit Massachusetts Corporation, founded in 1969, providing legal expertise on consumer law issues to public and private attorneys, policy makers, and consumer advocates across the country, with a special focus on low-income consumers. NCLC publishes a series of 18 practice treatises on consumer laws, including *Consumer Warranty Law* (4th ed. 2010 and 2011 Supp.). NCLC's attorneys have been closely involved with drafting committees for UCC Article 2 and 2A and the Uniform Consumer Leasing Act, have commented in the past on the FTC's Magnuson-Moss rules and on other rules proposed by the Commission, dating back to the 1970s.

These comments were written by Jerry Battle, John Van Alst, Carolyn Carter and Jonathan Sheldon.

Consumers for Auto Reliability and Safety (CARS) is a national, award-winning non-profit auto safety and consumer advocacy organization dedicated to preventing motor vehicle-related fatalities, injuries, and economic losses. CARS has spearheaded enactment of many landmark laws to protect the public and successfully petitioned the NHTSA and various state agencies for promulgation of consumer protection regulations.

Congress has repeatedly invited the President of CARS to testify on behalf of American consumers regarding auto safety practices and policies, including air bags and other automatic restraint systems, the safety hazards posed by salvage and flood vehicles, mandatory binding arbitration in auto sales contracts, and various fraudulent and predatory auto sales practices, which affect the ability of car buyers to afford advanced safety systems.

The National Association of Consumer Advocates (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students, whose primary focus involves the protection and representation of consumers. NACA manages the Institute for Foreclosure Legal Assistance. The mission of NACA is to promote justice for all consumers. NACA members have been at the forefront of the fight against predatory lending and residential foreclosures.

The Center for Responsible Lending (CRL) is a nonprofit, non-partisan research and policy organization dedicated to protecting homeownership and family wealth by working to eliminate abusive financial practices.

§ 700.3(c): FTC Should Clarify that the Act Applies to Consumer Leases.

Introduction

Case law is now divided as to whether the Act applies to consumer leases. When the Act was first drafted, consumer leases, particularly automobile leases, were rare, and consequently the Act's language was not clearly drafted as to its application to consumer leases. While the majority of decisions conclude that the Act applies to consumer leases,[1] a number of cases hold the opposite,[2] and there is no definitive resolution of the question. The FTC should resolve this unsettled question by interpreting the Act consistent with Congressional intent and the requirement that the Act be liberally construed to protect consumers. The FTC should interpret the Act as protecting consumers who lease consumer goods and not just those who purchase consumer goods.

Congressional Purpose Met By Applying Act to Consumer Leases

Consumers who lease vehicles have the same need for the Act's protections as consumers who purchase them. Consider a comparison of a motor vehicle installment sale and a motor vehicle lease. In both cases typically the consumer is responsible for vehicle maintenance and repairs. UCC Article 2 on Sales and Article 2A on Leases provide very similar warranty rights and in both cases the consumer can enforce those rights.

In both cases the UCC does not provide attorney fees for breach of warranty obligations and the UCC does not require warranty disclosures. In both cases, the UCC allows disclaimers of implied warranties with certain exceptions.

In both cases, the consumer is obligated to make payments for the full term of contract--either the installment credit contract or the lease. Charges are assessed if the consumer ends the transaction

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[1] Voelker v. Porsche Cars N. Am., Inc., 353 F.3d 516 (7th Cir. 2003) (sale to leasing company is for the ultimate purpose of resale at expiration of the lease term, but the lease is still subject to the Act because the lessee is a "consumer" who may enforce the warranty under state law); Cohen v. AM Gen. Corp., 264 F. Supp. 2d 616 (N.D. Ill. 2003); Mago v. Mercedes-Benz, U.S.A., Inc., 142 P.3d 712 (Ariz. Ct. App. 2006); Am. Honda Motor Co. v. Cerasani, 955 So. 2d 543 (Fla. 2007); Brophy v. DaimlerChrysler Corp., 932 So. 2d 272 (Fla. Dist. Ct. App. 2005); O'Connor v. BMW of N. Am., L.L.C., 905 So. 2d 235 (Fla. Dist. Ct. App. 2005); Mesa v. BMW of N. Am., L.L.C., 904 So. 2d 450 (Fla. Dist. Ct. App. 2005); Freeman v. Hubco Leasing, 324 S.E.2d 462 (Ga. 1985) (leased vehicle is a consumer product and lessor is a supplier); Mattuck v. DaimlerChrysler Corp., 852 N.E.2d 485 (Ill. App. Ct. 2006), *vacated and remanded*, 877 N.E.2d 1 (Ill. 2007) (remanding for reconsideration in light of Mydlach v. DaimlerChrysler Corp., 875 N.E.2d 1047 (Ill. 2007)); Pearson v. DaimlerChrysler Corp., 813 N.E.2d 230 (Ill. App. Ct. 2004); Mangold v. Nissan N. Am., Inc., 809 N.E.2d 251 (Ill. App. Ct. 2004); Korpalski v. DaimlerChrysler Corp., No. 01-M1-117397 (Ill. App. Ct. Feb. 26, 2004), *available at* www.consumerlaw.org/unreported; Dekelaita v. Nissan Motor Corp., 799 N.E.2d 367 (Ill. App. Ct. 2003); Ryan v. Am. Honda Motor Co., 896 A.2d 454 (N.J. 2006); Bus. Modeling Techniques, Inc. v. Gen. Motors Corp., 474 N.Y.S.2d 258 (Sup. Ct. 1984) (finding as a fact that vehicle was transferred to consumer while warranty was in effect, so may not be overruled by *DiCintio*); Szubski v. Mercedes-Benz, U.S.A., L.L.C., 796 N.E.2d 81 (Ohio Ct. Com. Pl. 2003); Henderson v. Benson-Hartman Motors, Inc., 33 Pa. D. & C.3d 6 (C.P. 1983); Peterson v. Volkswagen of Am., Inc., 697 N.W.2d 61 (Wis. 2005); *see also* Weisberg v. Jaguar Cars, 2004 U.S. App. LEXIS 5738 (7th Cir. Feb. 18, 2004) (remanding contrary district court decision for reconsideration in light of *Voelker v. Porsche Cars N. Am., Inc.*); Potente v. Peugeot Motors of Am., Inc., 598 N.E.2d 907 (Ohio Ct. Com. Pl. 1991) (applying identical state lemon law definition of a consumer to cover automobile lease).

[2] Stark v. Maserati N. Am., Inc., 2010 WL 4916981 (E.D.N.Y. Oct. 13, 2010) (following *DiCintio*); Parrot v. DaimlerChrysler Corp., 130 P.3d 530 (Ariz. 2006) (relying on highly atypical facts, in that there was no evidence that the dealer sold the vehicle to the entity to which the lease was assigned; case distinguished due to its unusual facts by Mago v. Mercedes-Benz, U.S.A., Inc., 142 P.3d 712 (Ariz. Ct. App. 2006), which found the Act to cover a lease); DiCintio v. DaimlerChrysler Corp., 768 N.E.2d 1121 (N.Y. 2002); Barco Auto Leasing Corp. v. PSI Cosmetics, 478 N.Y.S.2d 505 (Civ. Ct. 1984) (dicta; only issue was whether U.C.C. Article 2 applied); *see also* Alpiser v. Eagle Pontiac-GMC-Isuzu, Inc., 389 S.E.2d 293 (N.C. Ct. App. 1990) (court does not mention or analyze the second or third definitions of consumer; lease was directly from dealer, without any sale to a leasing company); *cf.* Corral v. Rollins Protective Services Co., 732 P.2d 1260 (Kan. 1987) (contract involved provision of security services and lease of burglar alarm system, with no option to buy; lease was directly from merchant, without any sale to a leasing company).

early. Early termination charges for automobile leases can be as high as $10,000 so turning the car in early rather than repairing it is not an economically viable option. Typically the lessor does not consider itself obligated to take back or repair a defective vehicle.

All the reasons for the Act to protect a consumer purchaser thus apply to a consumer lessee. As one court has stated:

> [P]ublic policy is best served by affording long-term automobile lessees the same rights afforded to buyers. ... Lessees committed more than $17,000 towards the purchase of the vehicle and bound themselves to its care for three years. When extensive warranties, such as the one defendant issued here, presumably are factored into the value of the vehicle, from which the monthly leasing amount is fashioned, it would serve no function to deny lessees the ability to enforce the warranty.[3]

Parsing the Act's Definition of "Consumer" and "Written Warranty"

Whether the Act applies to consumer leasing depends on whether a consumer lessee falls within the Act's definition of "consumer." This analysis is inordinately complex because of the multi-pronged definition of "consumer" and the definition's incorporation of the term written warranty which has its own definition. The Act defines consumer in the disjunctive as any one of the following:

(1) the "buyer (other than for purposes of resale)" of the product,

(2) a person to whom the product is "transferred during the duration of an implied or written warranty (or service contract)," or

(3) "any other person who is entitled by the terms of such warranty (or service contract) or under applicable state law" to enforce the warranty or service contract.[4]

While much ink has been spilled parsing this definition,[5] the FTC can and should interpret these phrases to include consumer leases. It should interpret the first prong as applying not just to a buyer but also to a lessee with an option to buy. Many automobile leases provide such an option, and such a transaction bears little difference from a credit sale--after paying for the car's value and financing (or leasing) charges, the consumer can own the vehicle outright.

The first element of the second prong requires that the consumer be a person to whom the product is transferred. Since "transfer" is a broader term than "sale," the FTC should clarify that a consumer who leases a vehicle rather than purchasing it meets this definition of a person to whom the product is transferred. The FTC's interpretation should also address the second element of this prong by making it clear that a product is transferred during the duration of an implied or written warranty if the transfer of the product and the commencement of the warranty occur simultaneously.

The third and final prong of the definition defines "consumer" to include any person who is entitled to enforce "such warranty (or service contract)."[6] In the typical lease transaction, the owner of the product—the leasing company or dealer—assigns the manufacturer's warranty to the consumer, and the consumer is entitled to enforce it. A consumer lessee thus meets the third prong of the definition of "consumer," and the FTC should thus interpret the Act as applying to consumer leases for this reason as well.

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[3] Dekelaita v. Nissan Motor Corp., 799 N.E.2d 367, 375/-/376 (Ill. App. Ct. 2003).

[4] 15 U.S.C. § 2301(3)

[5] The authors of these comments confess to having spilled a fair amount of this ink in National Consumer Law Center, Consumer Warranty Law § 2.2.6 (4th ed. 2010 and Supp.).

[6] It is unclear from the context whether "such warranty" refers to a written warranty, but that complexity need not be resolved here.

Some warrantors argue that the second and third prong do not apply because they refer to a written warranty and they argue the definition of written warranty does not apply to leases. The statutory definition of "written warranty" requires that the warranty be given "in connection with the sale of a consumer product by a supplier to a buyer" and that the warranty become "part of the basis of the bargain between a supplier and a buyer for purposes other than resale."[7] Of course, this argument ignores the fact that these two prongs also refer to implied warranties and service contracts. Consumer lessees have implied warranty rights under both UCC Article 2 and 2A, and are often sold service contracts.

Moreover, most courts recognize that the definition of written warranty, while requiring a "sale," does not require that the sale be *to the consumer*. In a lease, the vehicle or other product is sold by the manufacturer *to a consumer leasing company or dealer*. The leasing company's or dealer's purpose in acquiring the vehicle is to lease it to a consumer rather than resell it. The manufacturer gives the warranty to the consumer leasing company or dealer in connection with this sale, and it is part of the basis of the bargain between them. The leasing company or dealer then leases the vehicle to the consumer, and assigns the warranty rights to the consumer. With the transaction structured in this fashion, the warranty meets all the elements of the definition of "written warranty."

Section 700.3(c) already makes this distinction. It finds no written warranty where a supplier provides a warranty to a company where there is no intent that the warranty be passed on to a consumer or brought to the consumer's attention when the product is eventually passed on the consumer. On the other hand, the interpretation states where that warranty is later given to the consumer, there is a written warranty. The original warrantor relies on the warranty being eventually passed on to the consumer. The same is the case with a manufacturer's written warranty in consumer leases.

We ask that the FTC adopt an interpretation stating that a warranty given in a consumer lease that is structured in this way meets the definition of "written warranty." It would make no sense to define the same warranty, issued by the same manufacturer for the same vehicle, as a "written warranty" if the consumer purchases the car, but not if the consumer enters into a long-term lease in equal reliance on the warranty. A consumer lessee needs warranty protection just as much as a consumer buyer does.

To implement these suggestions, we ask that the FTC add a new section to Part 700:

§ 700.13 Consumer Leases

(a) The term "consumer" includes:

(1) A person who enters into a lease of a consumer product for purposes other than resale, if the lease includes an option to purchase the product;

(2) A consumer lessee to whom the consumer product is transferred by lease during the duration of an implied or written warranty, including a transfer the occurs simultaneously with the commencement of the warranty; and

(3) A consumer lessee who is entitled to enforce a written or implied warranty under the terms of the warranty or under applicable law.

(b) The term "written warranty" includes a supplier's warranty given in connection with a consumer lease if the supplier sells the consumer product to a consumer leasing company, dealer, or other intermediary, which then leases it to the consumer and assigns the warranty to the consumer or the consumer can enforce the warranty under applicable law.

[7] 15 U.S.C. § 2301(6)(A). The alternate definition in § 2301(6)(B) has substantively identical langugage.

§ 700.10(b): Certain 50/50 Warranties Should Be Interpreted as Violating the Act's Anti-Tying Provision

"50/50" warranties are warranties whereby the dealer promises to pay 50% of the labor costs and 50% of the parts cost and the consumer pays the remainder. Warranties may also use a higher or lower percentage than 50%, but this comment will use 50/50 warranty to apply to any warranty where the dealer and consumer share the cost of the warranty repair. 50/50 warranties are most commonly offered by used car dealers, particularly dealers selling to low-income, minority, or otherwise vulnerable consumers.

A 50/50 warranty offered on the condition that the warranty repairs are performed at a facility designated by the dealer violates the Act's anti-tying provision:

> No warrantor of any consumer product may condition his written or implied warranty of such product on the consumer's using, in connection with such product, any article or service (other than article or service provided without charge under the terms of the warranty) which is identified by brand, trade, or corporate name… .[8]

Section 700.10(b) explicitly finds this Act provision violated by the virtually identical practice of the dealer paying 100% of the parts and the consumer paying 100% for labor, but where the labor must be performed by someone designated by the dealer. The abuse is the same. In both cases the dealer designates the party to perform the labor, and the dealer requires the consumer to pay all or part of the labor costs.

If the dealer can designate the party to perform the labor, then there is no competition as to price and the repairing party (often the dealer itself) can charge a monopolistic price. The warranty can even be illusory because the labor price can be inflated to cover the dealer's share of the cost. The consumer in effect is required to pay the repair's full market-priced cost even where the warranty represents a 50/50 split, a clearly deceptive practice.

Thus it is not surprising that in the FTC's 1999 review of its Magnuson-Moss Rules, the FTC stated that 50/50 warranties "likely violate" the Act's anti-tying provision.[9] "Since the consumer must pay a significant charge for parts and labor under these warranties, the warranties may violate section 102(c) by restricting the consumer's choices for obtaining warranty service."[10]

However, after consumers in Ohio sued low-end used car dealers for conditioning warranty service on the consumer's payment of half the cost of parts and labor, the FTC was approached by dealers seeking a retraction of its 1999 statement. In 2002, the Secretary by direction of the Commission issued a letter disavowing its previous statement.[11]

We urge the FTC to reconsider this 2002 letter and instead clearly provide in § 700.10(b) that 50/50 warranties where the dealer designates the party to perform repairs be treated the same as warranties where the dealer pays parts and the consumer labor. In fact, the 2002 letter specifies that the Act prohibits dealers from designating the repair facility if the dealer pays for parts only and the dealer cannot specify the parts to be used if the dealer pays only for labor.

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[8] 15 U.S.C. § 2302(c).
[9] 64 Fed. Red. Reg. 19,700, 19703 (Apr. 22, 1999).
[10] *Id*.
[11] Letter from Donald S. Clark to Keith E. Whann, Representing the National Independent Automobile Dealers Association (Dec. 2, 2002), available at www.ftc.gov/os/2003/01/niadaresponseletter.htm.

The 2002 letter seeks to draw a distinction where the dealer is paying for portion of the labor and portion of the parts in that the dealer needs control over the diagnosis of the repair and the quality of the repair. While this seems no different than where the dealer pays for parts only or for labor only, any such concern could easily have been avoided by protections similar to those provided in § 700.10(c). The letter's weak rationale is not a basis to avoid the clear mandate of the Act, particularly since the letter forces consumers to pay for repair costs in a monopolistic setting.

In addition, 50/50 warranties where the dealer designates the repair facility meet the Act's definition of a deceptive practice whenever the cost for labor or parts exceed market rates. What appears to be warranty coverage is in fact illusory to the extent the consumer could have received the same repair elsewhere for no greater cost, even without the warranty coverage. The Act defines a deceptive warranty as one 1) that contains an affirmation, promise, description, or representation which would mislead a reasonable individual exercising due care, or 2) that uses a terms such as "guaranty" or "warranty," if the terms and conditions so limit its scope and application as to deceive a reasonable individual.[12]

50-50 warranties are deceptive under either of these tests. The promise of repair would deceive a reasonable person exercising due care, because the illusory nature of the warranty is not apparent to the consumer until the repair's cost to the consumer is later revealed. Similarly, the warranty's terms and conditions limit its scope and application: it allows the warrantor to raise the overall price of repairs so that the warranty provides no protection at all. This deception is likely to deceive a reasonable individual.

[12] 15 U.S.C. § 2310(c)(2).

§ 700.11(a): FTC Interpretation of Act's Application to Insurance Contracts Conflicts with a Federal Statute and Supreme Court Precedent

Section 700.11(a) interprets Magnuson-Moss' application to service contracts regulated as insurance. The interpretation should be changed because it directly conflicts with the federal McCarran-Ferguson Act and Supreme Court precedent.

The FTC interpretation states

> The McCarran-Ferguson Act, 15 U.S.C. 1101 et. seq., precludes jurisdiction under federal law over "the business of insurance" to the extent an agreement is regulated by state law as insurance.[13]

This FTC interpretation is contrary to both the McCarran Ferguson Act's explicit language and the Supreme Court's 1999 *Humana* decision.[14] The McCarran-Ferguson Act states:

> (b) Federal regulation
>
> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.[15]

The FTC's interpretation of this provision in § 700.11(a) is accurate only as to the application of the FTC, Sherman, and Clayton Acts to insurance, but *not* as to the Magnuson-Moss Warranty Act's application to insurance. For all federal statutes other than the three enumerated in the Act—FTC, Sherman, and Clayton Acts— the McCarran-Ferguson standard is that the federal statute cannot "invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." Since Magnuson-Moss is not one of the three enumerated statutes, the FTC interpretation should be amended to state that Magnuson-Moss does not apply to service contracts regulated as insurance only to the extent that the Act invalidates, impairs, or supersedes state insurance law.

This is also the standard set by the Supreme Court in *Humana.* In that case the Court was interpreting not Magnuson Moss but the federal Racketeer Influenced and Corrupt Organizations (RICO) statute.[16] The Court found RICO inapplicable to insurance only if it invalidates, impairs, or supersedes state insurance regulation.

That it is the FTC that is interpreting the Magnuson-Moss Warranty Act is no reason to utilize McCarran-Ferguson's standard as to the relationship of the FTC Act to state insurance law. The Magnuson-Moss interpretations interpret the Magnuson-Moss Act, not the FTC Act. The authority for the interpretations, as specified in the interpretations themselves, is not the FTC Act, but the Magnuson-Moss Warranty Act.[17] While the Magnuson-Moss Warranty Act is part of a public law that also contains amendments to the FTC, it is not an amendment to the FTC Act.[18]

[13] 16 C.F.R. § 700.11(a).
[14] Humana Inc. v. Forsyth, 525 U.S. 299, 301, 119 S. Ct. 710, 142 L. Ed. 2d 753 (1999).
[15] 15 U.S.C.A. § 1012 (West).
[16] 18 U.S.C. §§ 1961/-/1968.
[17] See 16 CFR § 700, Authority.
[18] *See* 1974 U.S.C.C.A.N. 2534 (text of Pub. L. No. 93-637, 88 Stat. 2183 (1975)).

The *Humana* holding provides the correct interpretation the FTC should utilize as to Magnuson-Moss' application to service contracts regulated as insurance. *Humana* holds that even though state insurance law provides a remedial scheme for insurance fraud, the additional availability of RICO remedies for the same misconduct does not "impair" the insurance regulatory scheme. "When federal law does not directly conflict with state regulation, and when application of the federal law would not frustrate any declared state policy or interfere with a State's administrative regime, the McCarran-Ferguson Act does not preclude its application."[19]

Similarly, even though state insurance law provides a remedial scheme for breach of a service contract regulated as insurance, the additional availability of Magnuson Moss remedies for the same misconduct does not "impair" the insurance regulatory scheme. For state insurance law to oust Magnuson-Moss application, a court must find that Magnuson-Moss remedies or requirements invalidate, impair or supersede a specific state insurance law.

The FTC should replace the last two sentences of § 700.11(a) with language to this effect:

> The McCarran-Ferguson Act, 15 U.S.C. 1011 et seq. requires that no provision of the Magnuson-Moss Warranty Act "shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." Thus Magnuson-Moss Warranty Act provisions relating to service contracts that are regulated under state law as contracts of insurance are effective only to the extent the provisions do not invalidate, impair, or supersede the state's insurance law.

[19] Humana Inc. v. Forsyth, 525 U.S. 299, 301, 119 S. Ct. 710, 142 L. Ed. 2d 753 (1999); *see also* Moore v. Liberty Nat'l Ins. Co., 267 F.3d 1209 (11th Cir. 2001) (Civil Rights statutes do not impede state insurance discrimination statute).

§ 700.11(c): FTC Should Clarify Meaning of "Entering Into" a Service Contract

Introduction

The Act prohibits a supplier from disclaiming implied warranties if the supplier "enters into a service contract with a consumer,"[20] but there is uncertainty today as to when a supplier "enters into" a service contract with a consumer. If a dealer sells the consumer its own service contract, clearly that dealer cannot disclaim implied warranties. Less clear are situations where the dealer sells another company's service contract--particularly since there are a number of ways such an arrangement can be structured. We urge the FTC to add an interpretation at the end of § 700.11(c) that a supplier enters into a service contract with a consumer whenever the supplier sells the contract, whether its sells its own contract or that of another company.

Dealer Intimately Involved in Sale of Other Party's Contract

The typical third-party service contract sold by a vehicle dealer is third-party only in name. Dealers typically structure these third-party service contract sales so that they receive a substantial portion or even the majority of the premium. The dealer may also or instead receive an "experience-rated rebate" from the service contract company. In other cases, the dealer will have interlocking ownership with the service contract company or reinsure the contract. In any of these situations, the dealer is the entity primarily profiting from the service contract and it is the dealer that is selling the contract to the consumer.

The dealer also exercises substantial control over the price and terms of the service contract. The dealer often will set the price at which the contract is sold. The dealer will decide to whom contracts are to be sold. The dealer will receive or finance the consumer's payment. The dealer is either the agent for or a retailer for the service contract company.

In addition, under the typical "third-party" automobile service contract, the dealer that sells the contract often performs most of the service work on the vehicle. Under some contracts, repair work may only be performed by the dealer unless special permission is obtained to obtain the repairs elsewhere. Some service contracts are sold with language that suggests that the dealer is responsible for payment if the service contract company does not pay or is at least ambiguous on that point.

Treating the dealer as a party to a "third-party" service contract is also consistent with the Uniform Commercial Code § 1-201(b) (26). That section defines "party as distinguished from "third party" as a person that has engaged in a transaction or made an agreement subject to the [Uniform Commercial Code]". The UCC applies to incidental services such as service contracts where the predominant thrust of the transaction concerns the sale of goods.[21] This means that the dealer is a party to the service contract and not just to the product otherwise being sold.

Congressional Intent Indicates "Entered Into" Should Have a Broad Scope

There are a number of reasons why Congress prohibited disclaimers of implied warranties where a supplier enters into a service contract. These reasons are unaffected by whether a dealer sells its own service contract or that of another company.

There would be significant consumer confusion if a consumer purchased a service contract while not receiving the basic implied warranty protections implied by law in every sale made by a merchant. Consumers purchasing a service contract in conjunction with a sale assume that they are obtaining reasonable coverage. This understanding is thwarted where the dealer disclaims implied

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[20] 15 U.S.C §2308 (c)

[21] Palmetto Linen Serv., Inc. v. U.N.X. , Inc., 205 F.3d 126 (4th Cir. 1997)

warranties and then places conditions and limits on the service contract. Congress in enacting Magnuson-Moss was requiring a minimum base-line of warranty protection whenever a service contract is sold, to guard against overly restrictive terms and hidden exclusions from the service contract itself.

This is the same rationale why Congress prohibited disclaimer of implied warranties where a written warranty is offered. The offering of a written warranty implies a minimum amount of warranty protection. The same is the case with the sale of a service contract. Consumers should not have to distinguish between various complex relationships of the seller and service contract company to know whether they in fact are receiving a minimum amount of warranty protection.

In addition, an implied warranty disclaimer tells the consumer that the seller cannot vouch for a product and that the consumer makes the purchase at the consumer's own risk. It is deceptive to allow a dealer to sell a service contract that purports to assure the condition of a vehicle while at the same time doing the opposite by disclaiming implied warranties. In effect, the dealer is offering the consumer warranty protection implied by law in every sale by a merchant only if the consumer pays for it. To allow this means that the seller can pervert UCC Article 2 by requiring the consumer to pay for warranties that Article 2 requires be part of the basis of the bargain whenever a merchant sells a product.

Congress in enacting the Act was preventing merchants that sell service contracts from charging consumers for warranty protection that the law provides them for free. This intent should not be frustrated by a dealer selling (and making a large profit from) another company's service contract just because it is not offering its own contract.

A Bright Line Test Is the Best Solution

To date, courts have come to different conclusions as to whether a seller has "entered into" a service contract with a consumer. Often courts make fine if conflicting distinctions as to the nature of the seller's relationship to the service contract company in helping them determine whether implied warranties may be disclaimed. This has led to confusion among both consumers and sellers. It also gives dealers and service contract providers the incentive to game the system by structuring their relationships in a way that will avoid the Magnuson-Moss Act's requirements.

We recommend a bright line test. If the same entity that sells the underlying product also sells the service contract to the consumer (irrespective of who is obligated on the service contract), then the seller has "entered into" the contract with the consumer. This is consistent with Congressional intent and provides easy application.

Part 701-- FTC Should Issue a Rule on Service Contract Disclosures

The Act authorizes the FTC to "prescribe by rule the manner and form in which the terms and conditions of service contracts shall be fully, clearly and conspicuously disclosed"[22] The FTC has not used this authority. While Part 701 prescribes disclosures for written warranties, the FTC has not adopted any disclosure requirements for service contracts.

We recommend service contract disclosures for two reasons. First, all the reasons for disclosure of a written warranty apply to a service contract. There is little functional difference between the two other than that the consumer pays for the service contract. See for example § 700.11(c). It makes little sense to establish detailed disclosure requirements for one and not the other.

Second, service contracts are widely sold, are often very expensive (thousands of dollars in the case of automotive service contracts), and consumers typically have little understanding what they are purchasing. The contract's actual terms and conditions are often sent to the consumer well after the contract is purchased.

The average portion of the contract's cost going to pay claims is often very small and coverage is often far less generous than consumers suppose. Undisclosed dealer mark-ups produce extremely high profit margins for dealers. For example, a contract that cost the seller $1,000 could be sold to a consumer for $2,000 or more.[23] AutoNation, the nation's largest automobile dealer, reports that dealers have earned billions of dollars in profits from service contracts and other add on contracts.[24] Additionally, consumers may be confused as to how to process a claim, who is administering the claim, and what is covered under the contract, so do not even receive the benefits the service contract purports to provide..

Disclosures should include:

- Identification of the parties to the contract
- The cost of the service contract
- The name and address of the service contract provider and administrator
- The steps the consumer should take to process a claim
- The terms and exclusions of the contract
- Identification of persons authorized to perform repairs; and
- The time period within which the service contract provider will perform obligations under the contract.

By definition, written warranties have no cost to consumers while service contracts do. Thus service contract disclosures, unlike those for written warranties, should cover pricing issues. Presently, a dealer often has wide discretion in setting the price the consumer receives. However, unchecked discretion can lead to price gouging of vulnerable consumers and discriminatory practices where individuals similarly situated are charged substantially different prices for the same product.[25]

There is thus a special need for clear disclosures posted to the general public in writing as to service contract pricing. While the cost of even inexpensive supermarket items are clearly posted, there is no advance disclosure of the standard price of a service contract that may cost thousands of dollars. In addition, there should be adequate disclosure of the method for canceling the contract and the formula for rebating unearned contract premiums.

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[22] 15 U.S.C § 2306 (b)
[23] Vehicle Service Contract Industry – How Consumers Lost Millions of Dollars, Better Business Bureau May 2011.
[24] Consumers Union Report – Auto Finance Add-ons: Little Bang for the Buck, March 2003.
[25] Jones v. Ford Motor Credit Co., 2002 WL 88431 (S.D.N.Y. Jan. 22, 2002).

§ 703.5(j): The FTC Should Retain Its Prohibition of Mandatory Arbitration of Written Warranty Disputes

Recommendation

We urge the FTC to reaffirm its requirement that any informal dispute settlement procedure be non-binding, including an informal procedure labeled as "arbitration." Despite the FTC's Rule and explicit statement to this effect, and despite language in the Act and legislative history supporting the FTC position, courts are split as to whether they require warrantors to follow the FTC Rule. To clarify the law, the FTC should reaffirm its position and explain in more detail its basis for requiring that *all* informal dispute resolution procedures for written warranty disputes be non-binding, including any procedure that the warrantor labels as "arbitration."

Background

Rule 703.5(j) states that a decision of an informal dispute settlement procedure incorporated into the written warranty shall not be legally binding.[26] The FTC in promulgating Rule 703 was explicit that the Rule prohibits binding arbitration as a warranty condition: "reference within the written warranty to any binding, non-judicial remedy is prohibited by the Rule and the Act."[27]

The FTC reiterated this ban in 1999 after a review of its Magnuson-Moss rules:[28]

> The Commission examined the legality and the merits of mandatory binding arbitration clauses in written consumer product warranties when it promulgated Rule 703 in 1975. Although several industry representatives at that time had recommended that the Rule allow warrantors to require consumers to submit to binding arbitration, the Commission rejected that view as being contrary to the Congressional intent.
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> The Commission based this decision on its analysis of the plain language of the Warranty Act. Section 110(a)(3) of the Warranty Act provides that if a warrantor establishes an IDSM that complies with Rule 703 and incorporates that IDSM in its written consumer product warranty, then "(t)he consumer may not commence a civil action (other than a class action) * * * *unless he initially resorts to such procedure*." (Emphasis added.) This language clearly implies that a mechanism's decision cannot be legally binding, because if it were, it would bar later court action. The House Report supports this interpretation by stating 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."**[69]** In summarizing its position at the time Rule 703 was adopted, the Commission stated:
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> The Rule does not allow (binding arbitration) for two reasons. First * * * Congressional intent was that decisions of 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*. (Emphasis added.)**[70]**
>
> Based on its analysis, the Commission determined that "reference within the written warranty to any binding, non-judicial remedy is prohibited by the Rule and the Act."**[71]** The Commission believes that this interpretation continues to be correct.**[72]** Therefore, the Commission has determined not to amend section 703.5(j) to allow for

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[26] 16 C.F.R. § 703.5(j); *see also* 16 C.F.R. § 703.5(g)(1) (consumers must be informed that they can pursue legal remedies if they are dissatisfied with the resolution of the informal dispute settlement procedure).

[27] *See* 40 Fed. Reg. 60,168, 60,211 (Dec. 31, 1975).

[28] Final Action Concerning Review of Interpretations of Magnuson-Moss Warranty Act § C(2), 64 Fed. Reg. 19,700, 19,708 (Apr. 22, 1999).

binding arbitration. Rule 703 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.

69 House Report (to accompany H.R. 7917), H. Report, No. 93-1107, 93d Cong., 2d Sess. 41 (1974). [*Ed. note*: *reprinted in* 1974 U.S.C.C.A.N. 7702, 7723.]

70 40 Fed. Reg. 60168, 60210 (1975). The Commission noted, however, that warrantors are not precluded from offering a binding arbitration option to consumers *after* a warranty dispute has arisen. 40 Fed. Reg. 60168, 60211 (1975).

71 40 Fed. Reg. 60168, 60211 (1975).

72 At least one federal district court has upheld the Commission's position that the Warranty Act does not intend for warrantors to include binding arbitration clauses in written warranties on consumer products. Wilson v. Waverlee Homes, Inc., 954 F. Supp. 2d 1530 (M.D. Ala. 1997). The court ruled that a mobile home warrantor could not require consumers to submit their warranty dispute to binding arbitration based on the arbitration clauses in the installment sales and financing contracts between the consumers and the dealer who sold them the mobile home. The court noted that a contrary result would enable warrantors and the retailers selling their products to avoid the requirements of the Warranty Act simply by inserting binding arbitration clauses in sales contracts. *Id.* at 1539/-/1540.

Since 1999 a number of courts have examined the FTC's position. While the Fifth and Eleventh Circuits in 2002 disagreed with the FTC's position,[29] just last month the Ninth Circuit found the FTC position reasonable and ruled that binding arbitration is not allowed for written warranty disputes. See *Kolev v. Euromotors West/The Auto Gallery*, *Motocars West LLC*, 2011 WL 4359907 (9^{th} Cir. Sept. 20, 2011). Moreover, even after the rulings in the Fifth and Eleventh Circuits, a number of courts in other jurisdictions follow the FTC approach.[30] On the other hand, other courts follow the Fifth and Eleventh Circuits.[31]

The FTC Has Authority to Require that Informal Dispute Procedures Be Non-Binding

15 U.S.C. § 2310(a)(2) states "The Commission *shall* prescribe rules setting forth minimum requirements for *any* informal dispute settlement procedure which is incorporated into the terms of a written warranty." [emphasis added] Not only does the FTC have authority to prescribe rules for informal dispute settlement procedures, it has an *obligation* to do so, and for "any" informal dispute settlement procedure. While the Act and legislative history make clear that any procedure must be non-binding, even if the FTC were to find that some mechanisms could be binding, then the FTC must also prescribe rules for such mechanisms.

The Act not only authorizes and requires that the FTC issue rules for informal dispute settlement procedures, but it requires that consumers be able to utilize legal remedies in court after utilizing the procedures:

[29] Walton v. Rose Mobile Homes, L.L.C., 298 F.3d 470 (5th Cir. 2002) (but see dissenting option by the court's chief judge); Davis v. Southern Energy Homes, Inc.,305 F.3d 1268 (11th Cir. 2002).

[30] *See* Higgs v. The Warranty Group, 2007 WL 2034376, at *8 (S.D. Ohio July 11, 2007); Rickard v. Teynor's Homes, Inc., 279 F. Supp. 2d 910, 921 (N.D. Ohio 2003); Browne v. Kine Tyson's Imports, Inc., 190 F. Supp. 2d 827, 831 (E.D. Va. 2002); Pitchford v. Oakwood Mobile Homes, Inc., 124 F. Supp. 2d 958, 963/-/964 (W.D. Va. 2000); Koons Ford of Baltimore, Inc. v. Lobach, 919 A.2d 722 (Md. 2007); Parkerson v. Smith, 817 So. 2d 529 (Miss. 2002); Tucker v. Ford Motor Co., 72 Va. Cir. 420 (2007); Philylaw v. Platinum Enterprises, Inc., 54 Va. Cir. 364 (2001); *see also* Simpson v. MSA of Myrtle Beach, Inc., 644 S.E.2d 663, 673 (S.C. 2007).

[31] *See*, Pack v. Damon Corp., 320 F. Supp. 2d 545 (E.D. Mich. 2004); Stacy David, Inc. v. Consuegra, 845 So. 2d 303 (Fla. Dist. Ct. App. 2003); Borowiec v. Gateway 2000, Inc., 808 N.E.2d 957 (Ill. 2004); Walker v. DaimlerChrysler Corp., 856 N.E.2d 90 (Ind. Ct. App. 2006); Abela v. Gen. Motors Corp., 677 N.W.2d 325 (Mich. 2004); McDaniel v. Gateway Computer Corp., 2004 WL 2260497 (Ohio Ct. App. Sept. 24, 2004); *In re* Am. Homestar of Lancaster, Inc., 50 S.W.3d 480 (Tex. 2001).

> One or more warrantors may establish an informal dispute settlement procedure which meets the requirements of the Commission's rules under paragraph (2). If--
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> * * *
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> (C) he incorporates in a written warranty a requirement that the consumer resort to such procedure *before pursuing any legal remedy under this section respecting such warranty*,
>
> then (i) the consumer may not commence a civil action (other than a class action) under subsection (d) of this section unless he *initially resorts to such procedure*. . . . In any civil action arising out of a warranty obligation and relating to a matter considered in such a procedure, any decision in such procedure shall be admissible in evidence.[32]

The Act's legislative history supports this explicit language. The House report accompanying this legislation states 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."[33] Congressman Moss, the named sponsor of the Act, explained in floor remarks that these provisions allow an opportunity for private dispute resolution, without limiting a warranty claimant's ultimate right to a judicial resolution: "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."[34]

Arbitration Is an Informal Dispute Settlement Procedure

While the FTC has an obligation to issue rules setting out that informal dispute resolution procedures be non-binding, it has been argued that "arbitration" is not such an informal dispute resolution procedure, but is a more "formal" procedure. On the contrary, nothing distinguishes "arbitration" from other forms of informal dispute settlement procedures other than the fact that the warrantor seeks to make the resolution binding on the consumer. Consider for example American Arbitration Association (AAA) rules for consumer disputes, found at http://www.adr.org/sp.asp?id=22014. A consumer sends notice initiating the procedure, AAA appoints a single arbitrator, and for disputes under $10,000 the arbitration is based solely on documents without a hearing. If a party requests a hearing, the arbitrator has discretion to deny the hearing and if there is a hearing, it can be by telephone. The arbitrator decides how the documents are to be submitted.

Nothing about such arbitration is more formal than Magnuson-Moss informal dispute resolution procedures. In fact, Magnuson-Moss procedures are arguably more formal in that oral presentations are a right and the other party has a right to be present.

The only real difference between Magnuson-Moss dispute resolution and arbitration is that the arbitration award is binding on both parties. In effect, the warrantor is arguing that because binding arbitration violates Magnuson Moss rules it cannot be governed by a Magnuson Moss informal dispute resolution requirements. But the Act *requires* the FTC to establish rules for *any* informal dispute resolution procedure incorporated into the written warranty, even one labeled as "arbitration" and even one that is not a precondition to bringing suit but is instead an alternative to bringing suit.

The Supreme Court has also stated on numerous occasions that arbitration is an "informal" dispute settlement procedure. For example, the Court's most recent arbitration decision relies on

[32] 15 U.S.C. § 2310(a)(3) (emphasis added).
[33] H.R. Rep. No. 93-1107, at 41 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7702, 7723.
[34] 119 Cong. Rec. 972 (1973) (statement of Rep. Moss).

arbitration being an informal procedure as a basis why parties cannot be forced into class-wide arbitration:

> First, the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1751, 179 L. Ed. 2d 742 (2011).

The Court also stated:

> And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution. Id. at 1749.

Similarly, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[35] the Court authorized private arbitration for the resolution of many types of statutory claims because a party who agrees to arbitrate "trades the procedures and opportunity for review of the court room for the simplicity, informality, and expedition of arbitration."[36] The Court went a step further in *Gilmer* by holding that ADEA claims are subject to mandatory arbitration because "[t]he EEOC . . . is directed to pursue '*informal methods* of conciliation, conference, and persuasion,' 29 U.S.C. § 626(b), which suggests that *out-of-court dispute resolution, such as arbitration,* is consistent with the statutory scheme established by Congress."[37]

Before the enactment of the Magnuson-Moss Act, the Supreme Court similarly described arbitration as informal, and this is evidence of a Congressional intent in enacting Magnuson-Moss that arbitration be considered an informal dispute resolution procedure. For example, prior to Magnuson-Moss' enactment, the Court distinguished private commercial arbitration from litigation based on its informal nature: "There the choice is between the adjudication of cases or controversies in courts with established procedures or even special statutory safeguards on the one hand and *the settlement of them in the more informal arbitration tribunal on the other*."[38] The Court also stated that "it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution."[39]

Allowing Binding Arbitration of Written Warranty Disputes Perverts Congressional Intent

The Act was enacted in part to facilitate small consumer warranty claims. Allowing binding arbitration of written warranty disputes would subvert this purpose. Under the Act and the FTC Rules, a consumer prevailing in alternative dispute resolution typically will obtain the desired relief without the consumer having to take any further steps--"the warrantor shall comply with any reasonable requirements imposed by the Mechanism."[40] If the consumer is not satisfied, the consumer retains all rights to go to court for a trial de novo (although the mechanism decision can be introduced into evidence). The Act thus encourages consumer recoveries by providing immediate relief if the consumer wins in the alternative dispute mechanism but providing an alternative avenue if the consumer loses.

Labeling an informal dispute mechanism "arbitration," thus allowing the process to be binding, turns Magnuson-Moss on its head. If the consumer prevails, the consumer still must go into court to

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[35] 473 U.S. 614, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985).
[36] *Id.*, 473 U.S. at 628; *see also* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991) (quoting *Mitsubishi Motors* for the proposition that securities industry arbitration proceedings are not as extensive as federal court procedures).
[37] *Gilmer*, 500 U.S. at 29 (emphasis added).
[38] United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960) (emphasis added).
[39] Alexander v. Gardner-Denver Co., 415 U.S. 36, 57, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974) (citations omitted) (emphasis added).
[40] 16 CFR § 702(h).

confirm the award--there is no requirement that a warrantor comply voluntarily with the arbitrator's award if the procedure is not deemed a "mechanism." If the consumer is not satisfied with the award, grounds to vacate an arbitration award are extremely narrow and would be almost impossible in this context.[41] Thus a winning consumer still has to go to court and a losing consumer has virtually no further avenue of relief.

By taking the same procedure and labeling it arbitration, the warrantor reverses the burdens on the parties almost 180 degrees. While Magnuson Moss was intended to facilitate small consumer claims, binding arbitration does the opposite.

Federal Arbitration Act Does Not Require a Different Conclusion

The FTC ruling does not interfere with the proper operation of the Federal Arbitration Act (FAA) provision that arbitration agreements are generally enforceable.[42] The FAA does not evidence a federal policy favoring the formation of arbitration requirements, but only a federal policy favoring the enforcement of an arbitration agreement that has been voluntarily agreed to and properly formed.[43] Federal law can certainly limit when arbitration agreements can be formed—nothing in the FAA favors arbitration where a federal policy opposes the formation of an agreement to arbitrate.

For example, federal law prohibits binding pre-dispute arbitration agreements between franchised automobile dealers and their franchisor/manufacturer.[44] If federal law restricts arbitration between car dealers and manufacturers, it can restrict arbitration between consumers and car dealers and manufacturers.

There are federal restrictions on arbitration involving military personnel,[45] residential mortgages,[46] livestock and poultry farmers,[47] and whistleblowers.[48] Both the Consumer Financial Protection Bureau and the Securities Exchange Commission are vested with authority to eliminate or restrict arbitration agreements.[49] There thus is no conflict between the FAA and an FTC ruling limiting binding arbitration of written warranty disputes where federal law provides the FTC authority to take that action.

Allowing Binding Arbitration Leads to Consumer Confusion

The Magnuson-Moss Warranty Act states:

> In order to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products, any warrantor warranting a consumer product to a consumer by means of a written warranty shall, to the extent required by rules of the Commission, fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty.[50]

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[41] 9 USC 10(a). Recent Supreme Court jurisprudence appears to eliminate even manifest disregard of the law as grounds to vacate.
[42] 9 USC § 2.
[43] See e.g. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943, 115 S. Ct. 1920, 1924, 131 L. Ed. 2d 985 (1995); *see also* AT & T Technologies, Inc. v. Communications Workers of Am., 475 U.S. 643, 648/-/649, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986).
[44] 15 USC § 1226.
[45] 10 USC § 987,
[46] 15 USC § 1639c(e).
[47] 7 USC § 197c.
[48] 12 USC § 5567; 18 USC § 1514a; 7 USC § 26.
[49] 12 USC § 5518; 15 USC §§ 78*o*, 80b-5(f)
[50] 15 U.S.C. § 2302(a).

The FTC rules require that that certain terms be clearly and conspicuously disclosed "in a single document in simple and readily understood language."[51]

Allowing binding arbitration of warranty disputes could lead to significant consumer confusion and could pervert any clear disclosure of warranty terms. A warrantor could require a consumer to submit a written warranty dispute to not one, but two informal dispute procedures. First the consumer would have to go to a non-binding mechanism. If dissatisfied, the consumer would have to go a different informal procedure that this time is binding. This would lead to great confusion as to which mechanism to first submit a claim and why a second mechanism procedure would be required.

Conclusion

We urge the FTC to reaffirm its position prohibiting binding informal dispute resolution procedures, including binding arbitration, to resolve written warranty disputes. We also recommend that the FTC clearly set out its authority and basis for doing so as a guide to the courts.

[51] 16 C.F.R. § 710.3(a).