

PRE-DISPUTE BINDING ARBITRATION IN CONSUMER WARRANTIES: THE NINTH CIRCUIT CONCLUDES CORRECTLY FOR ALL THE WRONG REASONS

Aaron K. Haar*

INTRODUCTION

On September 20, 2011, the United States Court of Appeals for the Ninth Circuit issued an opinion holding that federal law prohibited pre-dispute binding arbitration in consumer warranties.¹ The opinion created a split among the U.S. Courts of Appeals.² Not nine months later, on April 11, 2012, the same Ninth Circuit panel withdrew its opinion *sua sponte*, stripping the decision of any precedential value and avoiding the disagreement among the circuits.³

The apex of the issue in *Kolev v. Euromotors West/Auto Gallery* concerned the purported conflict between the Federal Arbitration Act (FAA) and the Magnuson-Moss Warranty Act (MMWA).⁴ On one side, the FAA⁵ has been interpreted to encompass a national policy favoring arbitration over litigation.⁶ On the other, the MMWA set consumer protection standards for warranties covering consumer products.⁷ The conflict between the two statutes arises in the remedies section of the MMWA. There, the Federal Trade Commission (FTC)—the agency charged with overseeing the MMWA—appears to have interpreted the statute to preclude binding arbitration in consumer warranties.⁸ The subsequent debate pit courts finding that the strong national policy behind the FAA prevailed against courts concluding that the FTC had authority to bolster the consumer-protection policy underlying the MMWA.

* J.D. Candidate 2013, William S. Boyd School of Law at the University of Nevada, Las Vegas. I would like to thank Professor Jean Sternlight for her ideas and suggestions. I would also like to thank Kendra Kisling for her suggestions, edits, and support.

¹ See *Kolev v. Euromotors W./Auto Gallery*, 658 F.3d 1024, 1031 (9th Cir. 2011), *opinion withdrawn*, 676 F.3d 867 (9th Cir. 2012).

² See, e.g., *Davis v. S. Energy Homes, Inc.*, 305 F.3d 1268, 1270 (11th Cir. 2002); *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470, 479 (5th Cir. 2002).

³ See *Kolev*, 676 F.3d 867, 867 (9th Cir. 2012) (order withdrawing opinion).

⁴ *Kolev*, 658 F.3d at 1029.

⁵ The Federal Arbitration Act, 9 U.S.C. §§ 1–307 (2012).

⁶ See, e.g., *Compucredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (noting that the FAA establishes “a liberal federal policy favoring arbitration agreements.”) (internal quotation marks omitted).

⁷ The Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301–12 (2012).

⁸ See 40 Fed. Reg. 60,190, 60,210 (1975).

Roughly half of interpreting courts have found that the FAA policy favoring arbitration outweighed the FTC's authority to preclude such arbitration.⁹ The others have found that the FTC was due deference in its interpretation forbidding arbitration in consumer warranties.¹⁰ Prior to the Ninth Circuit's decision in *Kolev*, only two U.S. Courts of Appeals had considered the issue in published opinions. Both found that the FAA prevailed and that the FTC could not prohibit binding arbitration in warranties.¹¹

The facts of *Kolev* are as follows: Diana Kolev purchased a "pre-owned" Porsche from a dealership in Southern California.¹² Thereafter, the vehicle began experiencing serious mechanical problems.¹³ The dealership refused to make appropriate repairs and declined to honor Ms. Kolev's warranty although the vehicle was still within the warranty period.¹⁴ When she filed suit for breach of warranty under federal and California law, the dealership filed a motion to compel arbitration pursuant to the binding arbitration clause included in its sales agreement.¹⁵ The U.S. District Court for the Central District of California granted the motion, and Ms. Kolev was required to arbitrate her claims.¹⁶

The arbitrator eventually resolved most of the claims in the dealership's favor, and the district court later confirmed the award.¹⁷ Ms. Kolev then appealed to the U.S. Court of Appeals for the Ninth Circuit.¹⁸ The Ninth Circuit reversed the arbitrator's decision on grounds that the MMWA precluded pre-dispute binding arbitration in consumer warranties and remanded the case back to the district court.¹⁹

Although state courts and federal district courts were already divided over the issue, the Ninth Circuit's decision created a circuit split that made Supreme Court review much more likely; that is, until the Ninth Circuit panel withdrew its opinion. In its brief withdrawal order, the panel vacated submission of the case to the lower court pending a decision by the California Supreme Court in *Sanchez v. Valencia Holding Co.*²⁰

The *Sanchez* case, like *Kolev*, evaluated the arbitration agreement in a commonly used auto sales agreement but applied state law instead of federal law. In the California Court of Appeals, the *Sanchez* Court found the arbitration

⁹ See cases cited *infra* notes 184–92.

¹⁰ See cases cited *infra* notes 180–83.

¹¹ See *Davis v. S. Energy Homes, Inc.*, 305 F.3d 1268, 1280 (11th Cir. 2002); *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470, 479 (5th Cir. 2002).

¹² *Kolev v. Euromotors W./Auto Gallery*, 658 F.3d 1024, 1025 (9th Cir. 2011), *opinion withdrawn*, 676 F.3d 867 (9th Cir. 2012).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 1031.

²⁰ *Kolev*, 676 F.3d at 867 (order withdrawing opinion). At the time the Ninth Circuit panel withdrew its *Kolev* decision, the parties both had petitions for rehearing and petitions for rehearing en banc pending.

clause unconscionable.²¹ The California Supreme Court granted the petition for review in *Sanchez* to determine whether the FAA preempts state law concerning unconscionability of certain arbitration provisions in light of *AT&T Mobility LLC v. Concepcion*.²² At the time this Note went to print, the California Supreme Court had not yet issued an opinion in *Sanchez*.

The California Supreme Court has stayed several cases pending the outcome of *Sanchez*.²³ *Sanchez* and most of these other cases share a common arbitration provision²⁴—the same arbitration provision at issue in *Kolev*.²⁵ Several state and federal cases in California previously found the arbitration clause in this sales agreement unconscionable.²⁶ Thus, by tying the outcome in *Kolev* to state law, the Ninth Circuit panel was likely trying to avoid review en banc or by the U.S. Supreme Court.

Scholarship on the interaction between the MMWA and the FAA has generally either agreed that the FAA supersedes the FTC's interpretation²⁷ or argued that courts should defer to the FTC for consumer protection purposes.²⁸

²¹ *Sanchez v. Valencia Holding Co.*, 135 Cal. Rptr. 3d 19, 41 (2011) *review granted and opinion superseded*, 272 P.3d 976 (Cal. 2012).

²² *News Release, Summary of Cases Accepted During the Week of March 19, 2012*, JUD. COUNCIL CAL. (Mar. 23, 2012), www.courts.ca.gov/documents/ws031912.pdf; *see also* *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).

²³ *See, e.g.*, *Goodridge v. KDF Auto. Grp., Inc.*, 147 Cal. Rptr. 3d 16 (Cal. Ct. App. 2012) *review granted and opinion superseded*, 290 P.3d 1116 (Cal. 2012); *Mayers v. Volt Mgmt. Corp.*, 137 Cal. Rptr. 3d 657 (Cal. Ct. App. 2012), *review granted and opinion superseded*, 278 P.3d 1167 (Cal. 2012); *Buzenes v. Nuvel Fin. Servs.*, No. B221870, 2012 WL 208051 (Cal. Ct. App. Jan. 25, 2012), *review granted* (May 9, 2012) (unpublished).

²⁴ *Sanchez*, 135 Cal. Rptr. 3d at 23 n.2 *review granted and opinion superseded*, 272 P.3d 976 (Cal. 2012); Respondent's Brief at 8, *Goodridge v. KDF Auto. Grp., Inc.*, 147 Cal. Rptr. 3d 16 (Cal. Ct. App. 2012) (No. D060269), 2012 WL 478376; Answer to Petition for Review at 4, *Buzenes v. Nuvel Fin. Servs.*, 2012 WL 1345014 (Cal. Ct. App.) (No. S200376).

²⁵ Appellant's Opening Brief at 10, *Kolev v. Euromotors W/Auto Gallery*, 2010 WL 4470826 (9th Cir. 2010) (No. 09-55963).

²⁶ *See, e.g.*, *Natalini v. Import Motors, Inc.*, No. A133236, 2013 WL 427909, at *1 (Cal. Ct. App. Feb. 5, 2013); *Fisher v. DCH Temecula Imports LLC*, 114 Cal. Rptr. 3d 24, 25 (Cal. Ct. App. 2010); *see also* *Lau v. Mercedes-Benz USA, LLC*, No. CV 11-1940 MEJ, 2012 WL 370557, at *11 (N.D. Cal. Jan. 31, 2012); *Smith v. Americredit Fin. Servs., Inc.*, No. 09CV1076 DMS (BLM), 2012 WL 834784, at *5 (S.D. Cal. Mar. 12, 2012); *Trompeter v. Ally Fin., Inc.*, No. C 12-00392 CW, 2012 WL 1980894, at *4, *7 (N.D. Cal. June 1, 2012). *But see* *Flores v. W. Covina Auto Grp.*, 151 Cal. Rptr. 3d 481, 505 (Cal. Ct. App. 2013).

²⁷ *See, e.g.*, Katherine R. Guerin, *Clash of the Federal Titans: The Federal Arbitration Act vs. the Magnuson-Moss Warranty Act: Will the Consumer Win or Lose?*, 13 LOY. CONSUMER L. REV. 4, 31 (2001) (arguing that the FAA likely supersedes the MMWA but that consumers are less protected this way); Andrew P. Lamis, *The New Age of Artificial Legal Reasoning as Reflected in the Judicial Treatment of the Magnuson-Moss Act and the Federal Arbitration Act*, 15 LOY. CONSUMER L. REV. 173, 181–84 (2003); Katie Wiechens, Comment, *Arbitrating Consumer Claims Under the Magnuson-Moss Warranty Act*, 68 U. CHI. L. REV. 1459, 1461 (2001).

²⁸ *See, e.g.*, Jonathan D. Grossberg, *The Magnuson-Moss Warranty Act, The Federal Arbitration Act, and the Future of Consumer Protection*, 93 CORNELL L. REV. 659, 687 (2008); Mace E. Gunter, *Can Warrantors Make an End Run? The Magnuson-Moss Act and Mandatory Arbitration in Written Warranties*, 34 GA. L. REV. 1483, 1486 (2000); Daniel G. Lloyd, *The Magnuson-Moss Warranty Act v. the Federal Arbitration Act: The Quintessential Chevron Case*, 16 LOY. CONSUMER L. REV. 1, 5 (2003).

Others propose changes to the language of the MMWA to ensure greater consumer protection.²⁹

This Note argues that the Ninth Circuit's decision, pre-withdrawal, was correct when it found that the MMWA precluded binding arbitration—but not for the reasons given by the Ninth Circuit, the Federal Trade Commission, other courts, and previously published law review articles. This Note suggests that the language of the FTC's regulations, along with arguments proffered by courts defending that interpretation, has ultimately been the FTC's undoing on the issue. If the FTC and its supporting courts had buttressed the arbitration prohibition with different reasoning, the circuit split and the Ninth Circuit's subsequent withdrawal could have been avoided—and the FTC's interpretation preserved.

Part I of this Note discusses the history of the FAA and the U.S. Supreme Court's evolving interpretation of the statute. Part II discusses the history of the MMWA, Congress's intent when it passed the MMWA, and the FTC's interpretation of the MMWA. Part III elaborates on the circuit split that culminated in the Ninth Circuit's decision and subsequent withdrawal of *Kolev v. Euromotors West/Auto Gallery*. It then outlines *Kolev*'s majority and dissenting opinions. Part IV evaluates the FTC's (and courts') unclear language and faulty reasoning underlying the prohibition on pre-dispute binding arbitration in consumer warranties. This section then makes suggested arguments that might have been more successful in preserving the FTC's interpretation. Finally, the Note concludes by injecting these suggested arguments into the remainder of the Ninth Circuit's original decision.

I. HISTORY OF THE FAA AND THE SUPREME COURT'S EVOLVING INTERPRETATION

A. *History of the FAA*

Arbitration's roots are traceable to early civilization where processes were formulated to quickly and efficiently dispose of private disputes.³⁰ Various communities, including merchant and trade groups, developed their own self-contained systems “for adjudicating disputes in accordance with local norms, standards, and rules.”³¹ As the prevalence of arbitration expanded, courts began to view arbitration as a threat to their jurisdiction.³² In 1609, Lord Coke created the “revocability doctrine,” which stated that parties were free to revoke the power of an arbitrator at any time prior to the issuance of an award.³³ Thereafter, English courts became increasingly hostile toward arbitration and, in 1746,

²⁹ Amy J. Schmitz, *Curing Consumer Warranty Woes Through Regulated Arbitration*, 23 OHIO ST. J. ON DISP. RESOL. 627, 631 (2008).

³⁰ Amy J. Schmitz, *Arbitration Ambush in a Policy Polemic*, 3 PENN ST. Y.B. ON ARB. & MEDIATION 52, 57 (2011) [hereinafter Schmitz, *Arbitration Ambush*].

³¹ *Id.*

³² *Id.* at 58.

³³ *Vynior's Case*, (1609) 77 Eng. Rep. 597 (K.B.) 598 n.A; 8 Co. Rep. 80 a. See also Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132, 138 (1934).

first articulated what became known as the “ouster” doctrine.³⁴ Under the ouster doctrine, parties could not “oust” a court’s jurisdiction by contract.³⁵

Despite this judicial backlash, the use of arbitration remained popular among business communities because “[m]erchant groups valued arbitrators’ specialized understanding of commercial issues and industry norms, and informal procedures that fostered continuing business relationships.”³⁶ The New York Chamber of Commerce, for instance, implemented an arbitration system immediately upon its founding in 1768.³⁷ During the American Revolutionary War, while public courts were shuttered, the Chamber continued to operate its independent arbitration system.³⁸

At the turn of the 20th century, businesses were booming and the court systems faced an increasingly demanding workload.³⁹ Commercial groups started lobbying for the enforceability of arbitration clauses at both the state and federal levels.⁴⁰ In 1920, the State of New York passed a law that enforced arbitration clauses in maritime contracts.⁴¹ That same year, the American Bar Association officially reported its support of commercial arbitration⁴² and, in 1922, produced a draft federal arbitration statute.⁴³

Senator Thomas Sterling of South Dakota and Representative Ogden Mills of New York, introduced the ABA’s proposed arbitration statute in 1922, enti-

³⁴ Kill v. Hollister, (1746) 95 Eng. Rep. 532 (K.B.); 1 Wils. K.B. 129 (first introducing the ouster doctrine); see also Wolaver, *supra* note 33, at 139 (discussing ouster).

³⁵ Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CALIF. L. REV. 577, 599 (1997).

³⁶ Schmitz, *Arbitration Ambush*, *supra* note 30, at 58.

³⁷ *Id.* at 57.

³⁸ *Id.* at 57–58.

³⁹ Jean R. Sternlight, *Panacea or Corporate Tool? Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 645 (1996).

⁴⁰ *Id.*

⁴¹ See *Red Cross Line v. Atl. Fruit Co.*, 264 U.S. 109, 118–19 (1924) (discussing The New York Arbitration Law enacted April 19, 1920 (§ 275 (Consol. 1920)), and amended March 1, 1921 (§ 14 (Consol. 1921)). Julius Cohen, general counsel of the New York State Chamber of Commerce, and Charles Bernheimer, chair of the Chamber’s arbitration committee, are credited with successfully championing the cause of arbitration—first in New York, then nationally. Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 101–02 (2006) [hereinafter Moses, *Statutory Misconstruction*]. “Bernheimer organized the support of the national business organizations. Cohen spearheaded the legal case.” *Id.* at 102.

⁴² Russell D. Feingold, *Mandatory Arbitration: What Process is Due?*, 39 HARV. J. ON LEGIS. 281, 285 (2002).

⁴³ Sternlight, *supra* note 39, at 645–46. “The original [FAA] was drafted, principally by Julius Cohen, on the model of the New York statute.” Moses, *Statutory Misconstruction*, *supra* note 41, at 102. In a brief submitted to Congress, and later included in the congressional record, Cohen argued that “since an arbitration agreement is essentially a business contract, it should be treated the same as other business contracts.” *Id.* at 103–04 (citing *Arbitration of Interstate Commercial Disputes: Hearing of S. 1005 and H.R. 646 Before the J. Comm. of Subcomms. on the Judiciary*, 68th Cong. 16, 33–41 (1924) (statement of Julius Cohen)). Cohen claimed that giving legal effect to arbitration agreements would help eradicate three policy “evils”: “(1) long delays caused by congested courts and excessive motion practice, (2) the expense of litigation, and (3) the failure through litigation to reach a decision regarded as just.” *Id.* at 103. Cohen argued that Congress’s authority to pass the arbitration legislation was not dependent on the Commerce Clause or admiralty power, but on the power of Congress “to establish and control inferior Federal Courts.” *Id.* at 108.

tled “A bill to make valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts, maritime transactions or commerce among the States or Territories or with foreign nations.”⁴⁴ When reintroduced in 1923, after failing in committee the prior year,⁴⁵ the bill excluded “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”⁴⁶ Apparently, this exclusion was a prominent consideration in passing the law because members of Congress expressed concern that dominant business interests might use arbitration to take advantage of weaker parties.⁴⁷ Representative Mills assured his fellow Congress members that the purpose of the bill was simply to make arbitration clauses enforceable just as other parts of a contract were enforceable.⁴⁸

The FAA passed in both the House and the Senate without a single opposing vote.⁴⁹ Calvin Coolidge eventually signed the FAA into law on February 12, 1925.⁵⁰ The core of the FAA states:

A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.⁵¹

Prior to the passage of the FAA, American courts generally followed the English standard of allowing willing parties to submit their dispute to arbitration, but refused to force a party to arbitrate if it changed its mind after entering a pre-dispute arbitration agreement.⁵² The FAA, thus, required courts to enforce such contractual agreements. The Supreme Court’s initial hesitance to

⁴⁴ S. 4214, 67th Cong., 64 CONG. REC. 732 (1922); H.R. 13522, 67th Cong., 64 CONG. REC. 797 (1922).

⁴⁵ See Paul Turner, *Preemption: The United States Arbitration Act, the Manifest Disregard of the Law Test for Vacating an Arbitration Award, and State Courts*, 26 PEPP. L. REV. 519, 538 (1999) (citing *Arbitration of Interstate Commercial Disputes: Hearings on S. 1005 & H.R. 646 Before the Joint Comm. of Subcomms. on the Judiciary, United States Senate and House of Representatives*, 68th Cong. 6 (1924) (statement of Charles L. Bernheimer, Chairman, Comm. on Arbitration, Chamber of Commerce of the State of N.Y.)).

⁴⁶ S. 1005, 68th Cong. (1923); H.R. 646, 68th Cong. (1923); *Arbitration of Interstate Commercial Disputes, Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. (1924). Herbert Hoover, then Secretary of Commerce, sent a letter to Congress that was eventually included in both the 1923 Hearings and the 1924 Joint Hearings, emphasizing that the arbitration bill should not apply to employee contracts and suggesting language to clarify the exclusion. Moses, *Statutory Misconstruction*, *supra* note 41, at 101 n.16, 105–06 & n.40 (citing *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 9, 14 (1923) & *Arbitration of Interstate Commercial Disputes: Hearing of S. 1005 and H.R. 646 Before the J. Comm. of Subcomms. on the Judiciary*, 68th Cong. 16, 21 (1924)). Hoover’s suggested language was implemented, nearly verbatim, into the final Act. *Id.*

⁴⁷ Feingold, *supra* note 42, at 286.

⁴⁸ 65 CONG. REC. 11,080 (1924) (comments of Rep. Mills).

⁴⁹ MOSES, *Statutory Misconstruction*, *supra* note 41, at 110.

⁵⁰ Feingold, *supra* note 42, at 284.

⁵¹ 9 U.S.C. § 2 (2012).

⁵² Sternlight, *supra* note 39, at 644–45.

empower the FAA eventually gave way to a relationship marked by fondness and active promotion.⁵³

B. The Supreme Court's Evolving Interpretation of the Federal Arbitration Act

The Supreme Court's arbitration jurisprudence has evolved since the FAA first became law.⁵⁴ Professor Jean Sternlight has recognized the evolutionary lifespan of the FAA as three discernible periods: (1) 1925–1966, (2) 1967–1982, and (3) 1983–Present.⁵⁵ The basis of these periods is the development of certain judicial policies surrounding the FAA that Professor Sternlight refers to as “myths.”⁵⁶ The first myth she asserts developed over these periods is that “commercial arbitration served a substantial public purpose and should be favored regardless of the parties’ intentions.”⁵⁷ Professor Sternlight also articulates “the dual myths that the FAA applies to actions brought in state court and that the FAA prohibits states from enacting legislation hostile to arbitration.”⁵⁸ Lastly, she discerns the myth that “arbitration is as appropriate for virtually all disputes as is litigation.”⁵⁹

1. The First Evolutionary Period

Professor Sternlight calls the first period, 1925–1966, “the period of original intent.”⁶⁰ At the passage of the FAA, it appears Congress intended the FAA to apply only to transactions between merchants of approximately equal bargaining power.⁶¹ Very few large merchants transacted with individual consumers at the time, and even fewer involved interstate commerce.⁶² When a senator voiced concern during a subcommittee hearing that arbitration clauses may be “offered on a take-it-or-leave-it basis to captive customers or employees,” the bill’s supporters reassured him that the bill was not intended to apply in those situations.⁶³

⁵³ Maureen A. Weston, *Preserving the Federal Arbitration Act by Reining in Judicial Expansion and Mandatory Use*, 8 NEV. L.J. 385, 392–93 (2007).

⁵⁴ One expert comments:

It is an open secret that the national policy favoring arbitration is a judges’ policy, not the policy of Congress in enacting the statute, and everyone knows what only the occasional dissenter and numerous academic critics claim: that “the [Supreme] Court has abandoned all pretense of ascertaining congressional intent with respect to the [FAA], building instead, case by case, an edifice of its own creation.”

David S. Schwartz, *The Federal Arbitration Act and the Power of Congress over State Courts*, 83 OR. L. REV. 541, 628 (2004).

⁵⁵ Sternlight, *supra* note 39, at 644, 653, 660.

⁵⁶ *Id.* at 644.

⁵⁷ *Id.* at 660.

⁵⁸ *Id.* at 664.

⁵⁹ *Id.* at 672.

⁶⁰ *Id.* at 644.

⁶¹ *Id.* at 647; *see also* Margaret L. Moses, *Privatized “Justice”*, 36 LOY. U. CHI. L.J. 535, 536 (2005).

⁶² Sternlight, *supra* note 39, at 647.

⁶³ *Id.* (citing *Hearing on S. 4213 and S. 4214 Before the Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong., 4th Sess. 9–11 (1923)).

The Supreme Court's first case regarding the scope of the FAA followed this general understanding. *Wilko v. Swan* involved an action by a customer against a securities brokerage firm for misrepresentation in a sale of securities.⁶⁴ In a conflict between the FAA and the Securities Act of 1933, which was intended to protect investors' rights, the Court avoided the arbitration agreement on grounds investor protections were less effective in arbitration than in judicial settings.⁶⁵

Also during this time, it appears the FAA was generally understood to apply only in federal court.⁶⁶ Although *Erie Railroad v. Tompkins*⁶⁷ had yet to be decided, the Supreme Court's holding in *Marine Transit Corp. v. Dreyfus*⁶⁸ strongly implied that the FAA was procedural, which would eventually make the FAA applicable only in federal court.⁶⁹ Of the numerous state cases that considered application of the FAA during this period, only one held that the FAA superseded state arbitration law.⁷⁰

After *Erie*, however, the Court heard a diversity case where it determined that, although the FAA appeared procedural, its application would likely affect the outcome of a case.⁷¹ Evaluating the FAA based on the "outcome determinative test" set out in *Guaranty Trust Co. of New York v. York*,⁷² the Court found that the FAA was actually substantive law, explaining that choosing arbitration over litigation could "make a radical difference in ultimate result."⁷³ Thus, federal courts were further limited in their use of the FAA because they now had to defer to state arbitration law in diversity cases.⁷⁴

⁶⁴ *Wilko v. Swan*, 346 U.S. 427, 428–29 (1953).

⁶⁵ *Id.* at 438.

⁶⁶ Sternlight, *supra* note 39, at 649. "In 1925, when the Act was considered and enacted, the American notions of interstate commerce were more restrained. Hence, the enacting Congress might even have thought it had no power to dictate arbitration law in state courts." Jeffrey W. Stempel, *Forgetfulness, Fuzziness, Functionality, Fairness, and Freedom in Dispute Resolution: Serving Dispute Resolution Through Adjudication*, 3 NEV. L.J. 305, 330 (2002/2003). Furthermore, the FAA preceded the Rules Enabling Act of 1934 and the promulgation of the Federal Rules of Civil Procedure in 1938, so Congress may not have even been able to "visualize a federal law that controlled state procedure regarding arbitrability at a time when a state's rules of procedure generally dictated procedure for the federal courts located in that state." *Id.* But see Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 105 (2002) ("Materials submitted to Congress by the principal drafter of the FAA, Julius Henry Cohen, provide strong evidence that the FAA was intended to apply in state court.").

⁶⁷ *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) (creating legal doctrine requiring federal courts with diversity jurisdiction to apply substantive state law and procedural federal law).

⁶⁸ *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263 (1932).

⁶⁹ Sternlight, *supra* note 39, at 650 & n.65.

⁷⁰ IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* 127–30 (1992) (citing *French v. Petrinovic*, 54 N.Y.S.2d 179 (App. Term 1945); *Wilson & Co. v. Fremont Cake & Meal Co.*, 43 N.W.2d 657 (Neb. 1950); *Parsons & Whittemore, Inc. v. Rederiaktiebolaget Nordstjerman*, 143 N.Y.S.2d 74 (App. Term 1955) (per curiam), *aff'd*, 145 N.Y.S.2d 466 (App. Div. 1955); *In re Omnium Freighting Corp.*, 185 N.Y.S.2d 857 (Sup. Ct. 1958); *Deep S. Oil Co. v. Texas Gas Corp.*, 328 S.W.2d 897, 906 (Tex. Civ. App. 1959)).

⁷¹ *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 202–03 (1956).

⁷² *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945).

⁷³ *Bernhardt*, 350 U.S. at 203.

⁷⁴ Sternlight, *supra* note 39, at 651.

2. *The Second Evolutionary Period*

The second evolutionary period Professor Sternlight recognized ranges from 1967 to 1982.⁷⁵ She refers to this time as the period when the “seeds of myths are planted.”⁷⁶ This period marked a shift of the Supreme Court focusing more on social policy than individual consent in determining applicability of the FAA.⁷⁷ One social policy, introduced by the dissent in *Barrentine v. Arkansas-Best Freight*,⁷⁸ eventually became particularly influential in Supreme Court jurisprudence: the reduction of court backlogs and resolution of disputes with greater efficiency.⁷⁹

In 1967, the Court decided *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,⁸⁰ which affirmed that the FAA was categorically grounded in Congress’s Commerce Clause powers.⁸¹ Although *Prima Paint* was a diversity case, the Court’s conclusion that the FAA was valid substantive federal law led to application of the FAA in state court under the Supremacy Clause.⁸² Recognizing the implications of the holding, Justice Black, joined by Justices Stewart and Douglas, penned a vigorous dissent that exceeded the majority opinion in length.⁸³

Prima Paint also introduced the concept that became known as the “separability doctrine.”⁸⁴ Under the separability doctrine, the arbitration clause, like all other contract clauses, is separable from the rest of the contract.⁸⁵ Courts, then, must review any direct challenges to arbitration clauses, while all other contractual challenges must be heard by an arbitrator.⁸⁶

The Court’s arbitration jurisprudence also underwent a transition in this second period, from the Court emphasizing the significant differences between arbitration and litigation to the Court determining that a substantial difference may exist depending on the circumstances.⁸⁷ In several labor cases, the Court

⁷⁵ *Id.* at 653.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Barrentine v. Arkansas-Best Freight*, 450 U.S. 728, 746 (1981) (Burger, C.J. & Rehnquist, J., dissenting).

⁷⁹ Sternlight, *supra* note 39, at 656.

⁸⁰ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). One commentator called *Prima Paint* “the first major misstep in interpreting the FAA.” See Moses, *Statutory Misconstruction*, *supra* note 41, at 100.

⁸¹ *Prima Paint*, 388 U.S. at 405.

⁸² Sternlight, *supra* note 39, at 656–57.

Once the Court essentially severed the FAA from its historical context by declaring it to be a substantive statute applicable in both state and federal court, it rarely looked back at the legislative history. Moreover, the justices not only ignored the historic context but also ignored or recast earlier precedent that was consistent with the intent of the enacting Congress. Instead, the Court relied on its own recently created precedent to entirely rewrite the statute and create an edifice of its own design.

Moses, *Statutory Misconstruction*, *supra* note 41, at 131–32.

⁸³ See *Prima Paint*, 388 U.S. at 407.

⁸⁴ Sternlight, *supra* note 39, at 656–57 & n.105.

⁸⁵ See *Prima Paint*, 388 U.S. at 403–04.

⁸⁶ *Id.*

⁸⁷ Sternlight, *supra* note 39, at 658–59.

found that arbitration was significantly different from litigation.⁸⁸ In other cases, the Court gradually began to find that arbitration could produce a decision that was just as good as a decision produced by litigation.⁸⁹

3. *The Third Evolutionary Period*

Professor Sternlight refers to the third period, 1983–Present, as the period when “the myths fully develop.”⁹⁰ In 1983, the Court decided *Moses H. Cone Memorial Hospital v. Mercury Construction*.⁹¹ There, the Court first announced a “federal policy favoring arbitration.”⁹² Though the Court stated no rationale for favoring arbitration, it appears the Court was motivated by its desire to conserve judicial resources.⁹³

During this period, the Court became even less concerned with the intention of the parties.⁹⁴ In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Court held that although “the parties’ intentions control,” a party’s “intentions are generously construed as to issues of arbitrability.”⁹⁵ Although the Court wrote subsequent decisions emphasizing consent,⁹⁶ its decision in *Doctor’s Associates, Inc. v. Casarotto*⁹⁷ ultimately prohibited state laws seeking to limit arbitration agreements even if the purpose was to ensure a knowing choice of arbitration.⁹⁸

Professor Sternlight notes that, during this period, the Supreme Court articulated “the dual myths that the FAA applies to actions brought in state court and that the FAA prohibits states from enacting legislation hostile to arbitration.”⁹⁹ In *Southland Corp. v. Keating*, the Court overruled the California Supreme Court’s interpretation that claims under a particular California statute

⁸⁸ *Id.* at 659 (citing *McDonald v. City of W. Branch, Mich.*, 466 U.S. 284 (1984); *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728 (1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974)).

⁸⁹ *Id.* at 659–60 (citing *Prima Paint*, 388 U.S. at 403–04; *Scherk v. Alberto-Culver*, 417 U.S. 506 (1974)).

⁹⁰ *Id.* at 660.

⁹¹ *Moses H. Cone Mem’l Hosp. v. Mercury Constr.*, 460 U.S. 1 (1983).

⁹² *Id.* at 24–25 (emphasis added).

[N]othing in the legislative history suggests a strong federal policy favoring arbitration. The 1925 Congress never indicated in the slightest way that arbitration was to be favored over judicial resolution of disputes. It simply made arbitration of commercial and maritime agreements enforceable in federal court because, until 1925, such agreements had essentially been revocable at will by the parties.

Moses, *Statutory Misconstruction*, *supra* note 41, at 123.

⁹³ Sternlight, *supra* note 39, at 660–61.

⁹⁴ *Id.* at 662.

⁹⁵ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

⁹⁶ *See Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477–79 (1989) (holding that parties could choose to be governed by state law rather than the FAA as long as the state law did not conflict with the FAA); *see also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995) (ruling in favor of the consumer on the basis that he was likely unaware of the effect of the arbitration clause); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944–45 (1995) (holding that the parties may decide whether the court or an arbitrator will resolve questions of arbitrability).

⁹⁷ *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996).

⁹⁸ *Id.* at 687; Sternlight, *supra* note 39, at 663.

⁹⁹ Sternlight, *supra* note 39, at 664.

could only be resolved through litigation and not through arbitration.¹⁰⁰ The Court based its reasoning on the Commerce Clause and a questionable reading of the FAA's legislative history.¹⁰¹ Shortly thereafter, in *Perry v. Thomas*, the Court invalidated part of another California statute that specifically exempted certain employment issues from arbitration.¹⁰²

After the Court granted certiorari in *Allied-Bruce Terminix Cos. v. Dobson*,¹⁰³ twenty state attorneys general submitted a joint amicus brief asking the Court to overturn *Southland* on grounds that states should have the power to control their own court proceedings.¹⁰⁴ The attorneys general argued that states should be allowed to protect "consumers and others of unequal bargaining power or information."¹⁰⁵ The Court disagreed, however, because *Southland*—then a decade-old precedent—was "now well-established law."¹⁰⁶

In *Doctor's Associates v. Casarotto*, the Court struck down a Montana law that required arbitration clauses to be "typed in underlined capital letters on the first page of the contract."¹⁰⁷ The Court made clear that the FAA imposed the requirement that arbitration clauses be treated on the same footing as any other contractual provision.¹⁰⁸ Thus, any state law that singled out arbitration for special treatment was inherently void under the FAA.¹⁰⁹

Another feature of this third period, Sternlight explains, is that the Court gradually eroded the public policy exception it created in *Wilko*.¹¹⁰ In *Shearson/American Express, Inc. v. McMahon*, a case similar to *Wilko*, the Court compelled arbitration against a consumer with claims against his brokerage firm under RICO and the Securities Exchange Act of 1934.¹¹¹ In finding that arbitration was an adequate substitute to litigation, the Court stated that its holding in *Wilko* was based on a mistrust of arbitration that was "difficult to square with the assessment of arbitration that has prevailed since that time."¹¹²

¹⁰⁰ *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). "[T]he FAA was never described in the legislative history as applying to any claims other than contract and maritime claims." Moses, *Statutory Misconstruction*, *supra* note 41, at 139.

¹⁰¹ Sternlight, *supra* note 39, at 664.

¹⁰² *Perry v. Thomas*, 482 U.S. 483 (1987).

¹⁰³ *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995).

¹⁰⁴ Sternlight, *supra* note 39, at 665 & n.156.

¹⁰⁵ *Id.* at 665 n.156 (quoting Brief Amici Curiae for the Attorneys General in Support of Petitioners, *Terminix*, 513 U.S. 265 (1995) (No. 93-1001)) (internal quotation marks omitted).

¹⁰⁶ *Terminix*, 513 U.S. at 272.

¹⁰⁷ *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 683 (1996) (quoting MONT. CODE ANN. § 27-5-114(4) (1995)) (internal quotation marks omitted).

¹⁰⁸ *Id.* at 687. Interestingly, by striking down the Montana law that required prominence of arbitration clauses within a contract, the court actually failed to place arbitration clauses "on the same footing as other contracts." Moses, *Statutory Misconstruction*, *supra* note 41, at 136. States frequently require certain contractual provisions to be conspicuous—"an attempt to exclude the implied warranty of merchantability must be conspicuous." *Id.* "If a state law cannot require that a provision containing an arbitration clause be conspicuous, it means the arbitration clause is not on the same footing as other provisions." *Id.*

¹⁰⁹ *Doctor's Associates*, 517 U.S. at 687.

¹¹⁰ Sternlight, *supra* note 39, at 669.

¹¹¹ *See Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 242 (1987).

¹¹² *Id.* at 229, 233.

The Court noted, however, that Congress could explicitly preclude arbitration under federal statute just as with any other statutory directive.¹¹³

Though not explicitly overturning *Wilko*, *McMahon* served as a forecast for *Wilko*'s eventual overruling two years later in *Rodriguez de Quijas v. Shearson/American Express, Inc.*¹¹⁴ There, the majority explicitly overruled *Wilko* because of the case's "judicial hostility to arbitration."¹¹⁵

Two years later, in *Gilmer v. Interstate/Johnson Lane Corp.*, the Court compelled arbitration in a claim arising under the Age Discrimination in Employment Act (ADEA).¹¹⁶ In *Gilmer*, an employee was required to register as a securities representative as a condition of his employment.¹¹⁷ As a requirement of registration, the employee was subject to an arbitration agreement when mandated by the rules of the New York Stock Exchange.¹¹⁸ The Court rejected the claim that compulsory arbitration of ADEA claims would be contrary to public policy.¹¹⁹ It held that the statute would "continue to serve both its remedial and deterrent function" as long as the complainant was able to have his claims heard in *some* forum.¹²⁰

Therein lay yet another myth—that "arbitration is as appropriate for virtually all disputes as is litigation."¹²¹ This myth was first announced in *Mitsubishi Motors*.¹²² The Court stated that submitting a claim to arbitration merely traded "the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."¹²³ The Court discarded a number of anti-arbitration arguments and concluded that arbitrators are capable of handling complex issues,¹²⁴ that arbitrators are not inherently biased,¹²⁵ and that choosing arbitration does not forego any substantive rights.¹²⁶ Professor Sternlight notes that these assertions, which have been reiterated in subsequent Supreme Court decisions, are not supported by any empirical data and do not address the issue of extreme imbalances of power.¹²⁷

In *Circuit City Stores, Inc. v. Adams*, the Court expanded the scope of the FAA to cover nearly all employment contracts.¹²⁸ The Court reasoned that the

¹¹³ *Id.* at 226.

¹¹⁴ See *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 480–81 (1989).

¹¹⁵ *Id.* at 480 (quoting *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942)) (internal quotation marks omitted).

¹¹⁶ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991).

¹¹⁷ *Id.* at 23.

¹¹⁸ *Id.* New York Stock Exchange Rule 347 required arbitration of any controversy arising out of a registered representative's employment. *Id.*

¹¹⁹ *Id.* at 27.

¹²⁰ *Id.* at 28 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)) (internal quotation marks omitted).

¹²¹ Sternlight, *supra* note 39, at 672.

¹²² *Mitsubishi Motors*, 473 U.S. at 628; Sternlight, *supra* note 39, at 672.

¹²³ *Mitsubishi Motors*, 473 U.S. at 628.

¹²⁴ *Id.* at 633.

¹²⁵ *Id.* at 634.

¹²⁶ *Id.* at 628.

¹²⁷ Sternlight, *supra* note 39, at 673.

¹²⁸ *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001). The ruling prompted one expert to refer to the case as the Supreme Court's "high water mark of statutory misinterpretation[.]" Moses, *Statutory Misconstruction*, *supra* note 41, at 146, and another to observe

employment contracts excluded by the FAA—“contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce”¹²⁹—were limited to those concerning transportation-related employees.¹³⁰

More recent cases have expanded the scope of the FAA even further. The Court in *Rent-A-Center v. Jackson*, building on *Prima Paint*, held that parties must submit to arbitration even when a party directly challenges the arbitration agreement *unless* the challenge focused specifically on the delegation clause within the agreement that granted the arbitrator jurisdiction.¹³¹ And in *Preston v. Ferrer*, the Court held that the FAA required arbitration even before state-law-provided administrative resolution.¹³²

Then, in a dispute between sophisticated business entities, the Court, in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, held that a complainant may not be granted class status without an explicit provision for resolution of class disputes within the arbitration agreement.¹³³ Thereafter, the Court in *AT&T Mobility LLC v. Concepcion* held that the FAA preempted a state’s judicial rule holding class arbitration waivers in consumer adhesion contracts unconscionable.¹³⁴ By so holding, the Court made it possible for corporations with superior bargaining power to completely eliminate any exposure to class action liability.¹³⁵

that “the Court seems to employ whatever methodology results in a victory for the party drafting the arbitration agreement” Stempel, *supra* note 66, at 332.

¹²⁹ 9 U.S.C. § 1 (2012).

¹³⁰ *Circuit City Stores, Inc.*, 532 U.S. at 109. The fact that the language of the statute only excluded these “transportation-related” employees is most likely due to the more restrained view of Congress’s authority to regulate interstate commerce when the FAA came about. *Cf.* Stempel, *supra* note 66, at 330 (“In 1925, when the Act was considered and enacted, the American notions of interstate commerce were more restrained.”). Based on the Act’s legislative history concerning implementation of the FAA in employment contracts, Congress probably would have excluded all employment contracts if it actually thought it had the authority to regulate them in the first place. *See* S. 1005, 68th Cong. (1924); H.R. 646, 68th Cong. (1925); *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. (1924).

¹³¹ *See* *Rent-A-Center, Inc. v. Jackson*, 130 S. Ct. 2772, 2778 (2010).

¹³² *Preston v. Ferrer*, 128 S. Ct. 978, 981 (2008).

¹³³ *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1775 (2010).

¹³⁴ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011). The Court issued this opinion despite Congress’s original understanding that the FAA would not apply to contracts of adhesion. *See* *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 15 (1924) (statement of Mr. Cohen, General Counsel for the New York State Chamber of Commerce).

¹³⁵ *See* Brian T. Fitzpatrick, *Supreme Court Case Could End Class-Action Suits*, S.F. CHRON. (Nov. 7, 2010, 4:00 AM), <http://www.sfgate.com/opinion/article/Supreme-Court-case-could-end-class-action-suits-3246898.php>. “Today’s statute—which has been construed to preempt state law, eliminate the requirement of consent to arbitration, permit arbitration of statutory rights, and remove the jury trial right from citizens without their knowledge or consent—is a statute that would not likely have commanded a single vote in the 1925 Congress.” Moses, *Statutory Misconstruction*, *supra* note 41, at 99–100.

II. HISTORY OF THE MAGNUSON-MOSS WARRANTY ACT, CONGRESSIONAL INTENT, AND THE FTC'S INTERPRETATION

A. *History of the Magnuson-Moss Warranty Act*

In response to an increase in complaints that manufacturers and retailers were failing to honor warranties, failing to cure product defects, and refusing to make repairs, President Lyndon Johnson assembled a task force in 1968 for the purpose of evaluating appliance warranties and service.¹³⁶ After studying more than 200 warranties over the next year, the task force reported that warranties were rampant with ambiguous language, including provisions that disclaimed any potential liability arising under implied warranty.¹³⁷

Around the same time, the FTC launched an investigation into automobile warranties.¹³⁸ The FTC concluded that vehicle quality was substandard and warranty coverage was deficient.¹³⁹ Furthermore, the FTC found that the auto industry's response to decreasing quality control was simply to bury its head in the sand.¹⁴⁰ The state of the auto industry led the FTC to propose comprehensive legislation to address the public safety concerns posed by these burgeoning problems.¹⁴¹

In 1967, Senators Warren Magnuson of Washington and Carl Hayden of Arizona introduced separate legislation covering home appliances and automobiles.¹⁴² For the next eight years, Congress deliberated over the appropriate contents of a warranty-related statute.¹⁴³ Simultaneously with warranty deliberations, Congress considered a bill to expand the power of the FTC.¹⁴⁴ The warranty bill and the FTC reform legislation were combined in 1971.¹⁴⁵ In 1972, Senator Norris Cotton of New Hampshire suggested an amendment to refer to the bill by the short title "Magnuson-Moss Act."¹⁴⁶ The name "Magnuson" clearly referred to Senator Warren Magnuson, but Senator Cotton proposed the ambiguous "Moss" as a political "ace in the hole"—both Senator Frank Moss of Utah and Representative John Moss of California were active supporters of the bill.¹⁴⁷

On December 18, 1974, the Senate adopted the final version of the "Magnuson-Moss Warranty—Federal Trade Commission Improvement Act" by a vote of 70–5.¹⁴⁸ The next day, the House followed suit by voice vote.¹⁴⁹

¹³⁶ Christopher Smith, *The Magnuson-Moss Warranty Act: Turning the Tables on Caveat Emptor*, 13 CAL. W. L. REV. 391, 393 (1977).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 393–94.

¹⁴² *Id.* at 395.

¹⁴³ 2 BARKLEY CLARK & CHRISTOPHER SMITH, *THE LAW OF PRODUCT WARRANTIES* § 14:2, at 14-5 (2010).

¹⁴⁴ *Id.* at 14-8.

¹⁴⁵ *Id.*

¹⁴⁶ Smith, *supra* note 136, at 391 n.2.

¹⁴⁷ *Id.*; *see also* 117 CONG. REC. 39,685 (1971).

¹⁴⁸ CLARK & SMITH, *supra* note 143, at 14-8–14-9.

¹⁴⁹ *Id.* at 14-9.

President Gerald Ford signed the Act into law on January 4, 1975,¹⁵⁰ to take effect July 4, 1975.¹⁵¹

B. Congressional Intent and the MMWA

The stated purpose of the MMWA is three-fold: (1) “to improve the adequacy of information available to consumers,” (2) to “prevent deception,” and (3) to “improve competition in the marketing of consumer products.”¹⁵² In seeking to accomplish these goals, Congress required “full and conspicuous disclosure of terms and conditions” of warranties under the MMWA.¹⁵³ The MMWA also required the warrantor to make the terms of a warranty available to the consumer prior to a sale.¹⁵⁴ Congress granted the FTC authority to establish rules concerning the “manner and form” of information presented in a warranty.¹⁵⁵

The MMWA set the federal minimum standards for warranties.¹⁵⁶ The MMWA does not require that sales of consumer products be accompanied by a warranty.¹⁵⁷ But, when warrantors *do* provide a warranty, they must “clearly and conspicuously designate” to what extent it fulfills these federal minimum standards by labeling the warranty as “full” or “limited.”¹⁵⁸

In the remedies section of the MMWA, Congress declared its policy “to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms.”¹⁵⁹ Congress adopted this policy because it found consumers were often denied a remedy under a warranty simply because adjudication was cost prohibitive.¹⁶⁰ Though the MMWA does not define “informal dispute settlement mechanisms,” it does grant the FTC authority to establish minimum requirements for informal dispute settlement procedures.¹⁶¹ The Act states that “warrantors *may establish* an informal dispute settlement procedure” that conforms to the FTC’s requirements.¹⁶²

If the warrantor establishes a conforming procedure and includes in the written warranty “that the consumer [must] resort to such procedure before pursuing any legal remedy under this section,” the Act grants the warrantor a number of benefits in return.¹⁶³ By following this prescribed route, the MMWA protects the warrantor from a civil action until the consumer has resorted to the

¹⁵⁰ *Id.*

¹⁵¹ Smith, *supra* note 136, at 395.

¹⁵² 15 U.S.C. § 2302(a) (2012).

¹⁵³ *Id.*

¹⁵⁴ *Id.* § 2302(b)(1)(A).

¹⁵⁵ *Id.* § 2302(b)(1)(B).

¹⁵⁶ *Id.* § 2304.

¹⁵⁷ *Id.* § 2302(b)(2).

¹⁵⁸ *Id.* § 2303(a)(1)–(2).

¹⁵⁹ *Id.* § 2310(a)(1).

¹⁶⁰ See H.R. REP. NO. 93-1107, at 27 (1974).

¹⁶¹ 15 U.S.C. § 2310(a)(2). The FTC-promulgated rules for informal dispute settlement procedures, requiring that the details of the procedure be included in the warranty. 16 C.F.R. § 701.3(a)(6) (2012).

¹⁶² 15 U.S.C. § 2310(a)(3) (emphasis added).

¹⁶³ *Id.*

procedure.¹⁶⁴ Further, the MMWA protects the warrantor from a class action until the named plaintiffs exhaust their options under the procedure.¹⁶⁵ The intended result is fair and expedient resolution of warranty claims and lower costs for both warrantors and consumers.¹⁶⁶

C. The Federal Trade Commission's Interpretation of the MMWA

Congress granted the FTC express authority to promulgate rules for implementation of the MMWA¹⁶⁷ and to prescribe rules for the statute's informal dispute settlement ("Mechanism") procedures.¹⁶⁸ The FTC published a policy statement on June 18, 1975, to provide guidance during implementation of the Act.¹⁶⁹ Thereafter, mired in continual requests for advisory opinions, the Commission published its full interpretations of the MMWA on July 13, 1977.¹⁷⁰ These interpretations covered a wide range of issues in the MMWA, including details of what must appear in a written warranty,¹⁷¹ details concerning warrantor obligations to provide consumers with warranty information prior to purchase,¹⁷² and details concerning the minimum standards for Mechanism procedures.¹⁷³

The FTC focused on the remedies section of the MMWA in determining that the Act precluded binding arbitration. It stated two reasons for such a conclusion. First, it found that Congress intended that "[s]ection 110 Mechanisms not be legally binding."¹⁷⁴ Second, the Commission stated that it was not prepared to implement guidelines for a system where consumers commit, at the time of purchase, to resolving disputes in a non-judicial proceeding.¹⁷⁵ The FTC asserted its belief that such a system would not sufficiently protect consumers.¹⁷⁶

The fuzzy language of the regulations appears to only prohibit *pre-dispute* binding arbitration agreements. The FTC stated that warrantors and consumers

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *See id.* § 2310(a)(1).

¹⁶⁷ *Id.* § 2312(c).

¹⁶⁸ *Id.* § 2310(a)(2).

¹⁶⁹ Final Action Concerning Review of Interpretations of Magnuson-Moss Warranty Act, 64 Fed. Reg. 19,700, 19,700 (Apr. 22, 1999) (codified at 16 C.F.R. pt. 700).

¹⁷⁰ *Id.* These interpretations eventually made their way to the Code of Federal Regulations under 16 C.F.R. §§ 700–03 (2012).

¹⁷¹ 16 C.F.R. § 701.

¹⁷² *Id.* § 702.

¹⁷³ *Id.* § 703.

¹⁷⁴ Rules, Regulations, Statements, and Interpretations Under Magnuson-Moss Warranty Act, 40 Fed. Reg. 60,168, 60,210 (Dec. 31, 1975) (codified at 16 C.F.R. pt. 701). The House Report supported this interpretation: "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." H.R. REP. NO. 93-1107, at 41 (1974). The statute itself fairly clearly establishes this fact as well, requiring submission to the informal dispute settlement procedure *before* commencing a civil or class action. *See* 15 U.S.C. § 2310(a)(3)(C).

¹⁷⁵ Rules, Regulations, Statements, and Interpretations Under Magnuson-Moss Warranty Act, 40 Fed. Reg. at 60,210.

¹⁷⁶ *Id.*

were free to utilize binding arbitration *after* a Mechanism decision.¹⁷⁷ It also indicated that parties may agree to commence binding arbitration *instead of* resorting to the Mechanism procedure if they find it more appropriate.¹⁷⁸ However, the Commission concluded, “reference *within the written warranty* to any binding, non-judicial remedy is prohibited by the Rule and the Act.”¹⁷⁹ Thus, it appears the FTC desired only to limit pre-dispute arbitration agreements, not necessarily pre-Mechanism agreements.

III. DEVELOPMENT OF THE CASE LAW AND *KOLEV*

A. *A Short-Lived Circuit Split*

State and federal courts are divided over whether the FTC could eliminate pre-dispute binding arbitration agreements in warranties. State courts that have followed the FTC’s interpretation include Maryland,¹⁸⁰ South Carolina,¹⁸¹ Mississippi,¹⁸² and Virginia.¹⁸³ Contrarily, state courts in Kansas,¹⁸⁴ Indiana,¹⁸⁵ Illinois,¹⁸⁶ Michigan,¹⁸⁷ Ohio,¹⁸⁸ Louisiana,¹⁸⁹ Georgia,¹⁹⁰ Texas,¹⁹¹ and Alabama¹⁹² have all rejected the FTC’s guidelines.

The federal court system has also experienced a good deal of dissonance on the issue. In 1997, the U.S. District Court for the Middle District of Alabama followed the FTC’s interpretation,¹⁹³ only to be overruled by a 2002 Eleventh Circuit decision.¹⁹⁴ The Southern District of Mississippi deferred to the FTC’s interpretation in 2000¹⁹⁵ before the Fifth Circuit went the other direction two years later.¹⁹⁶ In the Fourth Circuit, both federal district courts in

¹⁷⁷ *Id.* at 60,211.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* (emphasis added). The FTC revisited its interpretations of the MMWA again in 1999 and more clearly reaffirmed its commitment to “prohibit[ing] warrantors from including binding arbitration clauses in their contracts” Final Action Concerning Review of Interpretations of Magnuson-Moss Warranty Act, 64 Fed. Reg. 19,700, 19,708–09 (Apr. 22, 1999).

¹⁸⁰ *Koons Ford of Balt. v. Lobach*, 919 A.2d 722, 737 (Md. 2007).

¹⁸¹ *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663, 673 (S.C. 2007).

¹⁸² *Parkerson v. Smith*, 817 So. 2d 529, 535 (Miss. 2002).

¹⁸³ *Philyaw v. Platinum Enters., Inc.*, No. CL00-236, 2001 WL 112107, at *2 (Va. Cir. Ct. Jan. 9, 2001).

¹⁸⁴ *Hemphill v. Ford Motor Co.*, 206 P.3d 1, 12 (Kan. Ct. App. 2009).

¹⁸⁵ *Walker v. Daimler Chrysler Corp.*, 856 N.E.2d 90, 93 (Ind. Ct. App. 2006).

¹⁸⁶ *Borowiec v. Gateway 2000, Inc.*, 808 N.E.2d 957 (Ill. 2004).

¹⁸⁷ *Abela v. Gen. Motors Corp.*, 677 N.W.2d 325 (Mich. 2004).

¹⁸⁸ *McDaniel v. Gateway Computer Corp.*, No. 04CA12, 2004 WL 2260497, at *3 (Ohio Ct. App. Sept. 24, 2004).

¹⁸⁹ *Howell v. Cappaert Manufactured Hous., Inc.*, 819 So. 2d 461, 464 (La. Ct. App. 2002).

¹⁹⁰ *Crawford v. Results Oriented, Inc.*, 548 S.E.2d 342 (Ga. 2001).

¹⁹¹ *In re Am. Homestar of Lancaster, Inc.*, 50 S.W.3d 480, 491–92 (Tex. 2001).

¹⁹² *S. Energy Homes, Inc. v. Ard*, 772 So. 2d 1131, 1135 (Ala. 2000).

¹⁹³ *Wilson v. Waverlee Homes, Inc.*, 954 F. Supp. 1530, 1539 (M.D. Ala. 1997).

¹⁹⁴ *Davis v. S. Energy Homes, Inc.*, 305 F.3d 1268, 1280 (11th Cir. 2002).

¹⁹⁵ *Raesyly v. Grand Hous., Inc.*, 105 F. Supp. 2d 562, 573 & n.17 (S.D. Miss. 2000).

¹⁹⁶ *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470, 479 (5th Cir. 2002).

Virginia have complied with the FTC's anti-arbitration guidelines.¹⁹⁷ In the Sixth Circuit, the federal district courts for the Northern District of Ohio¹⁹⁸ and the Eastern District of Michigan¹⁹⁹ both followed the FTC's interpretation in 2003 and 2004, respectively.

Ninth Circuit courts first considered the issue in 2004. A magistrate judge in the District of Arizona issued an order compelling arbitration and rejecting the FTC's interpretation.²⁰⁰ The District of Oregon opted to follow the FTC's interpretation in 2008.²⁰¹ Then, in September 2011, the Ninth Circuit panel in *Kolev v. Euromotors West/Auto Gallery* split from the Fifth and Eleventh Circuits by finding that the FTC was, in fact, due deference in its interpretation.²⁰² The circuit split was short lived, however, because the Ninth Circuit panel withdrew its decision in April 2012.²⁰³

The decisions considering the FTC's interpretation of the MMWA contain similar arguments on both sides of the issue. Ninth Circuit Judge Stephen Reinhardt, writing for the majority in *Kolev*, cited to Chief Judge Carolyn King's Fifth Circuit dissent with marked approval throughout the decision.²⁰⁴ Similarly, Judge N. Randy Smith's dissent in *Kolev* closely tracks both the Fifth and Eleventh Circuit majority opinions rejecting the FTC's interpretation of the MMWA.²⁰⁵

B. *The Majority Decision in Kolev v. Euromotors West/The Auto Gallery*

The majority in *Kolev* first looked to the MMWA to establish that Congress delegated rulemaking authority under the statute.²⁰⁶ The court found this authority in 15 U.S.C. § 2310(a)(2), which granted the FTC authority to prescribe rules for informal dispute settlement procedures.²⁰⁷ Judge Reinhardt then applied the *Chevron* deference test to evaluate the FTC's anti-arbitration construction.²⁰⁸

¹⁹⁷ *Browne v. Kline Tysons Imports, Inc.*, 190 F. Supp. 2d 827, 831 (E.D. Va. 2002); *Pitchford v. Oakwood Mobile Homes, Inc.*, 124 F. Supp. 2d 958, 964 (W.D. Va. 2000).

¹⁹⁸ *Rickard v. Teynor's Homes, Inc.*, 279 F. Supp. 2d 910, 921 (N.D. Ohio 2003).

¹⁹⁹ *Harnden v. Ford Motor Co.*, 408 F. Supp. 2d 300, 307 (E.D. Mich. 2004).

²⁰⁰ *Order Compelling Arbitration, Dombrowski v. Gen. Motors Corp.*, 318 F. Supp. 2d 850, 850–51 (D. Ariz. 2004). The District of Arizona revisited the topic in 2009 and concluded similarly. *Jones v. Gen. Motors Corp.*, 640 F. Supp. 2d 1124, 1137 (D. Ariz. 2009).

²⁰¹ *Breniser v. W. Recreational Vehicles, Inc.*, 2008 WL 5234528, at *6 (D. Or. 2008).

²⁰² *Kolev v. Euromotors W./Auto Gallery*, 658 F.3d 1024, 1027–29 (9th Cir. 2011), *opinion withdrawn*, 676 F.3d 867 (9th Cir. 2012).

²⁰³ *Kolev v. Euromotors W./Auto Gallery*, 676 F.3d 867 (9th Cir. 2012).

²⁰⁴ *Kolev*, 658 F.3d at 1028–29 (citing *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470, 480–92 (5th Cir. 2002)).

²⁰⁵ *Id.* at 1031 (Smith, J., dissenting). The main difference between the Fifth and Eleventh Circuits' analyses is that the Fifth Circuit stopped after the first prong of the *Chevron* test, holding that Congress had spoken directly to the issue through the FAA's pro-arbitration presumption, *Walton*, 298 F.3d at 478 & n.14, while the Eleventh Circuit avoided the FTC's interpretation with the second prong of the *Chevron* test by finding that the agency's construction was impermissible, *Davis v. S. Energy Homes, Inc.*, 305 F.3d 1268, 1279 (11th Cir. 2002).

²⁰⁶ *Kolev*, 658 F.3d at 1025.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

Under the *Chevron* test, courts evaluate an agency's interpretation of a statute by applying a two-step approach.²⁰⁹ First, the court must determine "whether Congress has directly spoken to the precise question at issue."²¹⁰ If Congress's intent is clear, the matter is concluded because the court and agency must follow Congress's unambiguously expressed intent.²¹¹ If the statute is silent or ambiguous concerning that precise question, however, the court continues to the second step, where it must determine "whether the agency's answer is based on a permissible construction of the statute."²¹²

The *Chevron* Court stated that administrative oversight of congressionally created programs "requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."²¹³ In an explicit delegation, Congress grants authority to an agency to explicate specific statutory provisions by regulation.²¹⁴ These regulations are controlling unless the court finds them "arbitrary, capricious, or manifestly contrary to the statute."²¹⁵ Congress may also grant implicit authority to an agency, wherein the court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."²¹⁶

In *Kolev*, the two-judge majority found that Congress had not directly spoken to the question of whether parties may include pre-dispute binding arbitration clauses in warranties under the MMWA.²¹⁷ Accordingly, the court shifted its focus to the second prong of the *Chevron* test.

The court found three reasons why the FTC's interpretation was a reasonable construction of the statute. The first reason was that the FTC relied on legislative history declaring that decisions of informal dispute settlement mechanisms may not be legally binding.²¹⁸ The court pointed to the Subcommittee Staff Report, which stated that consumers must be informed of their rights, including their right to pursue litigation.²¹⁹ The court reasoned that the report appears to sympathize that the fate of aggrieved consumers rests with the warrantor and the warrantor's willingness to abide by its promises.²²⁰

Second, the court found that Congress, in the MMWA, sought to address "the extreme inequality in bargaining power that vendors wielded over consumers by 'providing consumers with access to reasonable and effective remedies' for breaches of warranty, and by 'provid[ing] the Federal Trade Commission (FTC) with means of better protecting consumers.'" ²²¹ The court pointed to

²⁰⁹ *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

²¹⁰ *Id.* at 842.

²¹¹ *Id.* at 842–43.

²¹² *Id.* at 843.

²¹³ *Id.* (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)) (internal quotation marks omitted).

²¹⁴ *Id.* at 843–44.

²¹⁵ *Id.* at 844.

²¹⁶ *Id.*

²¹⁷ *Kolev v. Euromotors W./Auto Gallery*, 658 F.3d 1024, 1026 (9th Cir. 2011).

²¹⁸ *Id.* at 1027 (citing 40 Fed. Reg. 60,168, 60,210 (Dec. 31, 1975)).

²¹⁹ *Id.* (citing 120 CONG. REC. 31,318 (1974)).

²²⁰ *Id.*

²²¹ *Id.* (quoting H.R. REP. NO. 93-1107, at [20, 29] (1974)). Note: The court, here, cites to page 24 of the House Report, but that is incorrect.

the FTC's assertion that it did not believe it could adequately protect consumers in a system that allowed warrantors to bind consumers to non-judicial proceedings at the time of purchase.²²² The court also cited the section of the House Report affirming that the decision of a Mechanism "would not be a bar to a civil action."²²³

Third, the majority referred to Supreme Court precedent finding that "a court may accord great weight to the long-standing interpretation placed on a statute by an agency charged with its administration."²²⁴ The court premised this longevity-based deference on the proposition that it is unlikely an error would persist for very long.²²⁵ The FTC promulgated its bar to pre-dispute binding arbitration in 1975, shortly after Congress enacted the MMWA. Since the FTC's interpretation "has persisted for more than thirty-five years" and "remains in effect to this day," the court concluded that the agency's construction was due strong deference.²²⁶

The court then addressed the argument that the FTC's interpretation was unreasonable based on multiple Supreme Court findings of a strong federal policy favoring arbitration.²²⁷ First, the court found that this argument was contrary to two well-established standards of statutory construction.²²⁸ The first standard—"that later enacted statutes take priority over older ones"—required that the MMWA prevail over the FAA, which became law fifty-one years before the MMWA.²²⁹ The second standard—"that more specific statutes control more general ones"—required that the consumer-warranty-specific MMWA take priority over the more general arbitration command of the FAA.²³⁰

Next, the court turned to the *McMahon* factors to find that the FTC's interpretation was reasonable. The Supreme Court in *Shearson/American Express Inc. v. McMahon* held that the FAA's arbitration directive "may be overridden by a contrary congressional command."²³¹ The *McMahon* Court suggested three factors to consider when evaluating a prospective contrary congressional command. It held that if Congress intended to proscribe arbitration in a particular statute, its intent would be deducible from (1) the text of the statute, (2) the statute's legislative history, or (3) "from an inherent conflict between arbitration and the statute's underlying purposes."²³² In a particularly conclusory

²²² *Id.* at 1027–28 (citing 40 Fed. Reg. at 60,211).

²²³ *Id.* at 1028 (quoting H.R. REP. NO. 93-1107, at 41).

²²⁴ *Id.* (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274–75 (1974)) (internal quotation marks omitted).

²²⁵ *Id.* (citing *Smiley v. Citibank*, 517 U.S. 735, 740 (1996)).

²²⁶ *Id.* at 1028–29.

²²⁷ *Id.* at 1029.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987).

²³² *Id.* at 227. The Fifth Circuit utilized the *McMahon* factors in the first prong of the *Chevron* test to find that Congress had spoken directly to the issue of enforceability of arbitration clauses. *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470, 478 (5th Cir. 2002). The Eleventh Circuit utilized the *McMahon* factors in the second prong of the *Chevron* test to find that the FTC's construction of the statute was unreasonable. *Davis v. S. Energy Homes, Inc.*, 305 F.3d 1268, 1279 (11th Cir. 2002).

argument, the *Kolev* Court found that the MMWA manifested a contrary congressional command sufficient to justify overriding the FAA simply because the FTC reinterpreted the MMWA in 1999 *after McMahon* was decided—though the court did not weigh the *McMahon* factors and provided no evidence that the FTC actually considered them.²³³

The third reason the *Kolev* Court discarded the claim that the FTC's interpretation was contrary to Supreme Court precedent was that the MMWA was "different in four critical respects from every other federal statute that the Supreme Court" rejected as failing to "rebut the FAA's pro-arbitration presumption."²³⁴ First, the court found the MMWA was the only statute wherein an authorized agency construed the statute to forbid binding arbitration.²³⁵ Second, only in the MMWA did Congress mention informal, non-judicial remedies and simultaneously bar any binding procedures.²³⁶ Third, in the MMWA, the court found that Congress explicitly preserved "a consumer's right to press his claims under the statute in civil court."²³⁷ Fourth, the court held that the primary purpose of the MMWA was to protect consumers by proscribing binding, non-judicial remedies.²³⁸ The court stated that the purpose of the FAA was "to expedite disputes through efficient, dispute-specific procedures and not to advance the interests of consumers."²³⁹

Thus, the *Kolev* Court concluded that "written warranty provisions that mandate pre-dispute binding arbitration are invalid under the MMWA and that the district court therefore erred in enforcing Porsche's warranty clause by compelling mandatory arbitration of Kolev's claims."²⁴⁰

C. *The Dissenting Opinion in Kolev*

In his dissent, Judge Smith argued that the majority was only able to reach its conclusion by conflating informal dispute Mechanisms with any possible alternative dispute resolution remedy.²⁴¹ He contended that FTC regulations for informal dispute settlement Mechanisms do not apply to binding arbitration remedies and that the FTC simply prohibited the *optional* Mechanisms from being binding.²⁴²

²³³ See *Kolev*, 658 F.3d at 1030.

²³⁴ *Id.* The court specifically referred to the Sherman Antitrust Act of 1890, the Securities Act of 1933, and the Securities Exchange Act of 1934. *Id.*

²³⁵ *Id.*

²³⁶ *Id.* (citing 15 U.S.C. § 2310(a)(2)(3)(C)). Congress granted the Commission authority to "prescribe rules setting forth minimum requirements for any informal dispute settlement procedure which is incorporated into the terms of a written warranty." *Id.* (quoting U.S.C. § 2310(a)(2)) (internal quotation marks omitted).

²³⁷ *Id.* (citing 15 U.S.C. § 2310(a)(3)(C)). The court supported this proposition with 15 U.S.C. § 2310(a)(3)(C), which required that a "consumer resort to such [informal dispute settlement] procedure *before* pursuing any legal remedy," and also on 15 U.S.C. § 2310(a)(3)(C)(i), which stated that "no consumer may 'commence a civil action . . . unless he *initially* resorts to such procedure.'" *Id.* at 1030–31.

²³⁸ *Id.* at 1031.

²³⁹ *Id.* (referencing *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011)).

²⁴⁰ *Id.*

²⁴¹ *Id.* at 1031–32 (Smith, J., dissenting).

²⁴² *Id.* at 1032.

Indeed, the dealership's warranty did not include any of the requirements of such a Mechanism.²⁴³ The warranty made arbitration a binding alternative to litigation rather than a prerequisite to litigation, as is required of such a Mechanism.²⁴⁴ Thus, the dealership's arbitration clause was outside the realm of these Mechanisms and could not be limited to a non-binding forum.²⁴⁵

Judge Smith pointed to the FTC's statement that "nothing in the Rule precludes the parties from agreeing to the use of some avenue of redress other than the Mechanism if they feel it is more appropriate."²⁴⁶ Further, the FTC affirmed that Rule 703, its guideline for Mechanisms, applies only to warrantors who incorporate a Mechanism within their written warranties.²⁴⁷ Therefore, Judge Smith argued, the FTC's prohibition of binding, non-judicial remedies was limited to its rules surrounding the statute's optional Mechanisms, not to any litigation alternative the parties might select.²⁴⁸

Judge Smith then argued that *Chevron* deference was inappropriate because Congress did not delegate authority to the FTC regarding dispute resolution outside the MMWA's Mechanism, and Congress gave courts the authority to enforce claims under the MMWA.²⁴⁹ The only gap in the MMWA that Congress left for the FTC to fill was limited to "prescrib[ing] rules setting forth minimum requirements for" Mechanisms.²⁵⁰ The MMWA did not address any remedies outside of the optional Mechanisms, nor did it imply that the FTC was granted authority to decide such issues.²⁵¹

In *Adams Fruit Co. v. Barrett*, the Supreme Court declined to extend *Chevron* deference to the Department of Labor when it sought to resolve ambiguities in the scope of the remedies section of the Seasonal Agricultural Worker Protection Act.²⁵² The Supreme Court stated that although "Congress clearly envisioned . . . a role for the Department of Labor in administering the statute by requiring the Secretary to promulgate standards implementing [certain] AWPA[] . . . provisions," Congress also "established an enforcement scheme independent of the Executive and provided aggrieved farm workers with direct recourse to federal court when their rights under the statute are violated."²⁵³ Similarly, Judge Smith wrote, "Congress clearly envisioned a role for the FTC in 'administering the statute by requiring the [Commission] to promulgate standards implementing [the Mechanism] provisions,' " but also "established an enforcement scheme independent of the Executive and provided aggrieved [consumers] with direct recourse to [state or] federal court where their rights

²⁴³ *Id.* at 1033.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 1034 (quoting 40 Fed. Reg. 60,168, 60,210 (Dec. 31, 1975)) (internal quotation marks omitted).

²⁴⁷ *Id.* (citing 64 Fed. Reg. 19,700, 19,707 (Apr. 22, 1999)).

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 1035.

²⁵⁰ *Id.* (citing 15 U.S.C. § 2310(a) (2006)).

²⁵¹ *Id.*

²⁵² *Id.* at 1035–36 (citing *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990)).

²⁵³ *Id.* at 1036 (citing *Adams Fruit*, 494 U.S. at 650) (emphasis omitted) (internal quotation marks omitted).

under the statute are violated.”²⁵⁴ Judge Smith concluded that the judiciary owes no deference to the FTC’s interpretation of the legality of extra-judicial enforcement procedures because Congress expressly established the judiciary as the adjudicator of rights under the statute.²⁵⁵

Finally, Judge Smith wrote, the FAA established a federal policy favoring enforcement of arbitration agreements.²⁵⁶ In every case before the Supreme Court that raised a statutory claim that did not explicitly preclude arbitration, the Court enforced the presumption of arbitrability under the FAA.²⁵⁷ Congress passed the FAA to overcome judicial suspicion and hostility toward arbitration.²⁵⁸ The FAA, therefore, forecloses any hope to find that binding arbitration conflicts with the MMWA’s purpose of protecting consumers.²⁵⁹ Thus, he summed up, the majority erred in concluding that the MMWA’s consumer-friendly policies imply that Congress intended to preclude binding arbitration.²⁶⁰

Therefore, Judge Smith concluded his dissent: “[t]he FTC’s ban on arbitration cannot reasonably be read to apply to anything other than an MMWA ‘Mechanism.’”²⁶¹

IV. THE FTC’S INTERPRETATION OF THE MMWA APPROPRIATELY PRECLUDES PRE-DISPUTE BINDING ARBITRATION BUT FOR REASONS OTHER THAN THOSE PROFFERED BY THE FTC AND THE COURTS

The FTC was not wrong to limit pre-dispute binding arbitration in warranties through the MMWA. The FTC’s interpretation is plagued, however, by unclear language and weak reasoning, which likely contributed to the massive resistance it met in state and federal courts. The courts that upheld the FTC’s interpretation, including the Ninth Circuit in *Kolev*, have generally extended the same line of reasoning. By bolstering that reasoning, the decisions extending the FTC’s interpretation would have been more compelling. The following sections identify these areas of unclear language and weak reasoning and suggest alternative arguments that might have been more successful in preserving the FTC’s interpretation and avoiding the conflict among the courts.

A. *Improperly Conflating Mechanisms with Any Form of Alternative Dispute Resolution*

In his *Kolev* dissent, Judge Smith correctly argued that the majority reached its conclusion by inappropriately conflating “Mechanisms” with any

²⁵⁴ *Id.* (citing *Adams Fruit*, 494 U.S. at 650) (some internal quotation marks omitted).

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 1037.

²⁵⁷ *Id.* at 1037–38.

²⁵⁸ *Id.* at 1036 (citing *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 225–26 (1987)).

²⁵⁹ *Id.* at 1037.

²⁶⁰ *Id.* at 1038.

²⁶¹ *Id.*

possible alternative dispute resolution remedy.²⁶² In fact, the majority's holding stemmed directly from the FTC's interpretation that binding arbitration was forbidden because Congress intended that "*Mechanisms* not be legally binding."²⁶³ This reasoning by the FTC has led courts on logical wild goose chases across the country as judges attempted to justify a total arbitration ban in warranties with only the support that *Mechanisms* cannot be legally binding.

Judge Smith then argued that the majority had misinterpreted the FTC's regulation and that the FTC had not actually intended to prohibit arbitration as an alternative. Smith reasoned that *Mechanisms* were merely optional, so a party could opt to utilize binding arbitration *instead of* a *Mechanism*.²⁶⁴ He pointed to the FTC's *Mechanism* regulation that "nothing in the Rule precludes the parties from agreeing to the use of some avenue of redress other than the *Mechanism* if they feel it is more appropriate."²⁶⁵ The regulations also state, however, that "reference within the written warranty to any binding, non-judicial remedy is prohibited by the Rule and the Act."²⁶⁶ This statement can only be reconciled with the continued availability of binding arbitration if it is read to prohibit *pre-dispute* binding arbitration. Thus, the FTC's regulations allow parties to pursue binding arbitration once a conflict arises, but the regulations do not allow parties to include binding arbitration beforehand within a written warranty.²⁶⁷

Judge Smith tried to sweep this apparent prohibition of pre-dispute binding arbitration under the rug by reasoning that the FTC intended only to limit the requirements of *Mechanisms* because the statement was contained in the section concerning the FTC's rules for *Mechanisms*.²⁶⁸ Therefore, he argued, pre-dispute binding arbitration was a valid alternative to a *Mechanism* but did not, itself, qualify as a *Mechanism*. This argument cannot be sustained, however, because the regulation clearly prohibits "*any* binding, non-judicial remedy" in written warranties. And the regulation specifically states that the source of the prohibition is "the Rule *and the Act*." Thus, Judge Smith's attempt to limit the FTC's prohibition under "the Rule" alone is unconvincing.

The only reasonable conclusion from the language of the regulations is that the FTC intended to forbid pre-dispute binding arbitration. The only congressional support the FTC provided for this prohibition was that Congress intended that *Mechanisms* remain non-binding. *Mechanisms* are expressly optional, however, so warrantors are not required to abide by *Mechanism* rules.

²⁶² See *id.* at 1031–32.

²⁶³ Rules, Regulations, Statements, and Interpretations Under Magnusson-Moss Warranty Act, 40 Fed. Reg. 60,168, 60,210 (Dec. 31, 1975) (emphasis added).

²⁶⁴ *Kolev*, 658 F.3d at 1033–34 (Smith, J., dissenting).

²⁶⁵ *Id.* at 1034 (citing 40 Fed. Reg. at 60,210).

²⁶⁶ Rules, Regulations, Statements, and Interpretations Under Magnusson-Moss Warranty Act, 40 Fed. Reg. at 60,211.

²⁶⁷ This point is supported by the FTC's 1999 Rules and Regulations, where the agency cited *Wilson v. Waverlee Homes, Inc.*, 954 F. Supp. 1530 (M.D. Ala. 1997), as having "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." See Final Action Concerning Review of Interpretations of Magnuson-Moss Warranty Act, 64 Fed. Reg. 19,700, 19,708 n.72 (Apr. 22, 1999).

²⁶⁸ *Kolev*, 658 F.3d at 1034 (Smith, J., dissenting).

If optional Mechanisms must remain non-binding, any form of alternative dispute resolution then may still be binding; it just will not fit within the definition of Mechanisms. But, alas, the Ninth Circuit was left to bridge the FTC's faulty implication, and it concluded that pre-dispute binding arbitration was disallowed, in part, because it was binding. Aside from this insufficient argument, the FTC offered one other reason for the prohibition that was equally ineffectual: consumer protection.

B. *Improper Method of Consumer Protection*

In response to industry comments that MMWA Mechanisms should be legally binding, the FTC stated that “[t]he Commission is not now convinced that any guidelines [for a system where consumers would commit to resolving any future disputes in a non-judicial, binding proceeding, at the time of the product purchase] could ensure sufficient protection for consumers.”²⁶⁹ Admittedly, the FTC was specifically discussing the legal effect of Mechanisms in this statement. But the fact that the FTC impliedly conflated Mechanisms with all potential forms of alternative dispute resolution warrants consideration of this statement as another reason the FTC chose to prohibit pre-dispute binding arbitration.

If any one principal can be gleaned from the Supreme Court's recent arbitration jurisprudence, it is that arbitration clauses cannot be singled out for treatment different from other, more mundane clauses within a contract.²⁷⁰ The Supreme Court has adopted a zero tolerance policy for the notion that arbitration is in any way inferior to litigation.²⁷¹ This zero tolerance extends to attempts by courts, state legislatures, and agencies to protect a weaker party when there is a perceived imbalance of power.²⁷² Although Congress created the FTC, in large part, to protect consumers,²⁷³ it is very unlikely the Supreme Court would allow the agency's consumer protection authority to overrule Congress's specific pronouncement that arbitration agreements cannot be hindered by hostile sentiments. Therefore, the argument that consumer protection justi-

²⁶⁹ Rules, Regulations, Statements, and Interpretations Under Magnusson-Moss Warranty Act, 40 Fed. Reg. at 60,210.

²⁷⁰ See, e.g., *Doctor's Associates v. Casarotto*, 517 U.S. 681, 687 (1996) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)) (“By enacting § 2, we have several times said, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed ‘upon the same footing as other contracts.’”).

²⁷¹ See, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745–47, 1750, 1753 (2011).

²⁷² See, e.g., *id.* at 1763 (overruling California's *Discover Bank* rule, which permitted a party to a consumer contract to demand class arbitration *ex post* even after the party signed a class waiver, as “preempted by the FAA”); *Doctor's Associates*, 517 U.S. at 683 (invalidating a Montana statute as preempted by the FAA because the legislature wrote the statute to require an enforceable arbitration clause to be printed on the first page of a contract as well as to be otherwise conspicuous); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28–29 (1991) (“the mere involvement of an administrative agency in the enforcement of a statute is not sufficient to preclude arbitration.”).

²⁷³ See Federal Trade Commission Act, ch. 311, § 1, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C §§ 41–58 (2012)).

fies a prohibition of binding arbitration, although perhaps a valid normative argument, is not an effective practical argument.

As a result, courts upholding the FTC's interpretation were left to their own devices to either follow the FTC's unclear language and weak reasoning or to determine whether another valid justification existed for eliminating pre-dispute binding arbitration from written consumer warranties.

C. Justification for Prohibiting Pre-Dispute Binding Arbitration in Consumer Warranties

In the MMWA, Congress declared its policy "to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms."²⁷⁴ Notably, Congress took an undemanding position in this section; it gave warrantors the *option* of adopting these Mechanisms without forcing them to do so. Yet Congress provided certain benefits to induce warrantors to adopt Mechanisms. Thus, it is clear that Congress stated a preference for these Mechanisms over seeking some other legal remedy.

In holding that Congress did not intend to preclude binding arbitration under the MMWA, the Fifth Circuit found that Congress explicitly stated that Mechanisms would be a *prerequisite* to filing a lawsuit—and arbitration is generally considered a *substitute*.²⁷⁵ Thus, the Fifth Circuit concluded, a warrantor that chose not to adopt a Mechanism could still include binding arbitration agreements in its warranties.²⁷⁶ But, if arbitration is merely an alternative medium, or a substitute, for seeking a legal remedy, that implies that Congress's preference for non-binding Mechanisms included a preference over arbitration as another legal and binding remedy.

Mechanisms essentially act like a mediator/special master over disputes between a warrantor and consumer. Mechanisms do not require a law-trained expert²⁷⁷ and do not include formal discovery.²⁷⁸ Mechanisms permit oral presentations only in limited instances.²⁷⁹ There are no time or cost restraints in arbitration, whereas a Mechanism must issue a decision within forty days of notification of the dispute.²⁸⁰ Warrantors have a disincentive to keep arbitration costs low; high costs discourage consumer actions.²⁸¹ In Mechanisms, however, warrantors have an incentive to keep costs low because costs are borne solely by the warrantor.²⁸² Therefore, Mechanisms are generally more efficient and less costly. And the Supreme Court used arbitration's efficiency and cost

²⁷⁴ 15 U.S.C. § 2310(a)(1) (2012).

²⁷⁵ *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470, 475 (5th Cir. 2002).

²⁷⁶ *Id.* at 479.

²⁷⁷ *See* 16 C.F.R. § 703.4 (2013).

²⁷⁸ 16 C.F.R. § 703.5(c) (the Mechanism itself is responsible for investigating, gathering, and organizing all necessary information for evaluating the claims and rendering a decision).

²⁷⁹ 16 C.F.R. § 703.5(f).

²⁸⁰ *See* 16 C.F.R. §§ 703.5(d)–(e).

²⁸¹ Indeed, "[t]he costs of arbitration can be so high that they deny consumers access to a forum in which to air their disputes." Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, 67 L. & CONTEMP. PROBS. 133, 161 (2004).

²⁸² *See* 16 C.F.R. § 703.3(a).

effectiveness to fuel, at least in part, its evolving interpretation and preference for arbitration over litigation.²⁸³

Since Congress made Mechanisms optional, it created incentives for warrantors to employ them. For warrantors that implement a Mechanism according to both the MMWA and the FTC's more specific Mechanism rules, a "consumer may not commence a civil action . . . unless he initially resorts to such procedure."²⁸⁴ Furthermore, the named plaintiffs in a class action "may not proceed in a class action . . . unless [they] . . . initially resort to such procedure."²⁸⁵ Thus, Congress sought to encourage Mechanism use by rewarding warrantors for implementing them. In the FAA, Congress simply empowered arbitration clauses. In the MMWA, Congress empowered Mechanisms but also created incentives to implement them. Congress did not provide such encouragement to implement arbitration proceedings. Therefore, it may be stated that Congress expressed its preference for Mechanisms over arbitration.

For warrantors, the benefits of binding arbitration swallow the benefits of Mechanisms, thereby eliminating any incentive Congress created to encourage the use of Mechanisms. Binding arbitration clauses *preclude* civil actions rather than making complainants resort first to that particular forum. And, as discussed above, the Supreme Court, in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, held that a complainant may not be granted class status without an explicit provision for resolution of class disputes within an arbitration agreement.²⁸⁶ Accordingly, arbitration clauses effectively eliminate class actions altogether.²⁸⁷

Congress could not have intended to create ineffectual incentives for employing Mechanisms. The canons of statutory construction require that an interpretation be made in a manner that gives force and effect to all sections of the statute. An interpretation rendering parts of a statute moot is disfavored to interpretations that give effect to all parts.²⁸⁸ Arbitration renders the incentives to implement Mechanisms moot. Congress would not have created the Mechanism incentives if it did not intend them to have effect.

Note, again, that the FTC did not have authority to prohibit pre-dispute binding arbitration for the sake of protecting consumers from the process of pre-dispute binding arbitration; the Supreme Court has repeatedly held that arbitration cannot be treated with such mistrust and hostility. The FTC's prescriptive authority, therefore, comes from Congress's delegation to make rules for Mechanism procedures²⁸⁹ and to supplement the statute's protections.²⁹⁰ Mechanisms—and the incentives to implement them—act as part of the statute's protections. To be clear, the statute's protections are the affirmative implements of the MMWA, not protection *from* arbitration. So, the FTC had

²⁸³ See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011).

²⁸⁴ 15 U.S.C. § 2310(a)(3) (2012).

²⁸⁵ *Id.*

²⁸⁶ *Stolt-Nielsen S.A. v. AnimalFeeds Int'l*, 130 S. Ct. 1758, 1775 (2010).

²⁸⁷ It is reasonable to conclude that the more powerful and sophisticated party will omit any provision for resolution of class disputes within their arbitration agreements. See *Concepcion*, 131 S. Ct. at 1750–51 (2011).

²⁸⁸ *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991).

²⁸⁹ 15 U.S.C. § 2310(a)(2).

²⁹⁰ *Id.* § 2309(b).

authority to act in a manner that would preserve the implements of the MMWA. Since pre-dispute binding arbitration eliminates any benefit Congress extended to encourage the use of Mechanisms, the FTC had authority to proscribe pre-dispute binding arbitration.

Likely foreseeing that warrantors would not adopt Mechanisms without a valid reason to do so, the FTC precluded pre-dispute binding arbitration in warranties upon passage of the MMWA. With many courts either overlooking or refusing to enforce this regulation, warrantors continued to include arbitration clauses in their warranties. Indeed, when the FTC revisited its MMWA Rules and Regulations in 1999, it noted that “few warrantors incorporate [Mechanisms] into their warranties.”²⁹¹

Therefore, the FTC had valid reasons to prohibit pre-dispute binding arbitration in warranties; the FTC did not need to use consumer protection from arbitration as its reason and could have avoided conflating Mechanisms with all other forms of alternative dispute resolution. Congress demonstrated a preference for Mechanisms over seeking a legal remedy. Congress also created incentives to employ Mechanisms, and those incentives must be given force and effect. Of course, Congress had to appropriately delegate authority to the FTC to extend these policy goals. This delegation is considered next.

D. Delegated Authority

Congress granted the FTC authority to “prescribe rules setting forth minimum requirements for any informal dispute settlement procedure which is incorporated into the terms of a written warranty to which any provision of this chapter applies.”²⁹² This was the only clause cited by courts as granting the FTC authority to preclude binding arbitration in warranties. The clause may be enough to justify regulations outside of Mechanism procedures to appropriately set the stage for implementation. In light of the Supreme Court’s recent arbitration jurisprudence, however, the FTC likely needs additional support to overcome the Court’s strong preference for arbitration.

The FTC can find this MMWA “necessary and proper” clause at 15 U.S.C. § 2309(b). The clause states that the FTC “to the extent necessary to supplement the protections offered the consumer by this chapter, shall prescribe rules dealing with such warranties and practices.”²⁹³ As discussed above, the FTC cannot cast aside arbitration under the guise of consumer protection. However, it can, “to the extent necessary to *supplement* the protections” of the MMWA, make rules concerning warranties and warrantor practices.²⁹⁴ Furthermore, Congress included a clause that “[t]he Commission shall promulgate rules for initial implementation of this chapter as soon as possible after January 4, 1975”²⁹⁵

In conclusion, because the FTC had authority “to the extent necessary to supplement the protections” of the MMWA, it had the authority to adopt

²⁹¹ Final Action Concerning Review of Interpretations of Magnuson-Moss Warranty Act, 64 Fed. Reg. 19,700, 19,707 (Apr. 22, 1999).

²⁹² 15 U.S.C. § 2310(a)(2).

²⁹³ *Id.* § 2309(b).

²⁹⁴ *See id.* (emphasis added).

²⁹⁵ *Id.* § 2312(c).

requirements outside Mechanism rules to ensure Congress's protections were implemented. When Congress passed the MMWA to protect consumers, it created Mechanisms so consumer disputes could be settled "fairly and expeditiously." Had Congress omitted the section creating Mechanisms, its intended consumer protections would be lessened. If Congress's incentives for warrantors to employ Mechanisms are rendered ineffectual, as they are by allowing pre-dispute binding arbitration, then warrantors will not utilize Mechanisms. If warrantors do not utilize Mechanisms, the section creating Mechanisms is useless and effectively omitted. Thus, Congress's intended consumer protections are diminished by failing to give force and effect to Mechanism incentives. The FTC could not, itself, protect consumers from arbitration, but it could protect consumers in ways Congress deemed necessary. The FTC merely set the stage for Mechanism use by finding that the MMWA precluded binding arbitration. Thus, the FTC did not go beyond "*the extent necessary* to supplement the protections" of the statute.

E. Chevron Analysis

Courts evaluating the FTC's MMWA regulations have performed *Chevron* analyses to determine whether the court should grant the FTC deference. Within their *Chevron* analyses, the federal courts of appeals evaluated the factors developed in *Shearson/American Express Inc. v. McMahon* to determine whether Congress expressed a contrary congressional command sufficient to override Congress's FAA arbitration directive. Again, the *McMahon* Court held that Congress's command would be deducible from the text of the statute in question, the statute's legislative history, or "from an inherent conflict between arbitration and the statute's underlying purposes."²⁹⁶

Courts have evaluated the *McMahon* factors under either of the *Chevron* prongs. The Fifth Circuit applied the *McMahon* factor analysis under the first prong of the *Chevron* test.²⁹⁷ The evaluation was likely applied in that manner because the first prong of *Chevron*—whether Congress has directly spoken to the precise question at issue—sounds substantially similar to the purpose of the *McMahon* analysis—to determine whether Congress expressed a contrary command sufficient to override the FAA. The Fifth Circuit concluded its decision after the first *Chevron* prong, finding that Congress had spoken directly to the issue of enforceability of arbitration clauses.²⁹⁸

Although it ultimately reached the same conclusion as the Fifth Circuit, the Eleventh Circuit considered the *McMahon* factors under the second prong of the *Chevron* test.²⁹⁹ It likely did so because the *McMahon* factors—statutory text, legislative history, and the statute's purpose—are the types of factors a court would consider when evaluating whether an agency's construction is reasonable rather than if the construction directly answers a precise question. The Eleventh Circuit found that Congress had not directly spoken to the precise question at issue and then concluded that the FTC's interpretation of the statute

²⁹⁶ *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987).

²⁹⁷ *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470, 478 & n.14 (5th Cir. 2002).

²⁹⁸ *Id.*

²⁹⁹ *Davis v. S. Energy Homes, Inc.*, 305 F.3d 1268, 1279 (11th Cir. 2002).

was unreasonable based on the *McMahon* factors.³⁰⁰ Like the Eleventh Circuit, the Ninth Circuit considered the *McMahon* factors under the second prong of *Chevron*.³⁰¹

The *McMahon* factors are more reasonably evaluated in the second prong of the *Chevron* test. The outcome of evaluating the text, the legislative history, and an inherent conflict between arbitration and the statute's purpose speaks more to the reasonability of an interpretation rather than answering a specific question. "Directly" speaking to a precise question implies a certain level of clarity and obviousness. If Congress directly spoke to a precise question, there would be no need to consider anything beyond the black letter of the law. A look at congressional intent and the underlying policy rationale simply fits better in determining whether an interpretation of the statute is reasonable. Furthermore, the *McMahon* analysis provides a test for whether the FTC's construction is permissible. If a court used the *McMahon* analysis to determine whether Congress directly spoke to the precise question, the court would also likely look to those same factors to evaluate the second prong of *Chevron*, thereby merging *Chevron*'s two steps into one. Therefore, it is more appropriate to consider whether the MMWA expressed a contrary congressional command sufficient to override the FAA in the second prong of *Chevron*.

1. *Congress Has Not Directly Spoken to the Precise Question at Issue*

As stated above, the precise question at issue is whether binding arbitration may be precluded from consumer warranties. The FAA was a general directive passed to overcome prior judicial hostility toward arbitration. The blanket requirements of the FAA may be read to apply to all questions of arbitrability unless Congress appears to carve out a more recent, more specific exception.³⁰² Assuming the statute creates ambiguity justifying *Chevron* analysis, as it does here, the question of arbitrability of warranty claims under the MMWA is both more specific and more recent than the blanket FAA. Thus, Congress has not answered the present precise question at issue. Therefore, the analysis continues to the second prong of *Chevron*: whether the agency's answer is based on a permissible construction of the statute.

2. *The FTC's Answer Is Based on a Permissible Construction of the Statute*

Congress must have granted implicit authority for the FTC to prohibit binding arbitration because Congress did not explicitly speak to the question at issue.³⁰³ Congress authorized the FTC to make rules "to the extent necessary to supplement the protections" of the MMWA.³⁰⁴ As established above, this authority incorporates questions of staging, including giving force and effect to

³⁰⁰ *Id.*

³⁰¹ See *Kolev v. Euromotors W./Auto Gallery*, 658 F.3d 1024, 1026–27, 1029 (9th Cir. 2011), *opinion withdrawn*, 676 F.3d 867 (9th Cir. 2012).

³⁰² See *id.* at 1029.

³⁰³ See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

³⁰⁴ 15 U.S.C. § 2309(b) (2012).

the incentives Congress expressly implemented in the MMWA. Thus, Congress implicitly granted authority to the FTC to promulgate such rules.

When Congress has granted an agency implicit authority, courts “may not substitute [their] own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”³⁰⁵ Therefore, the FTC’s interpretation precluding binding arbitration need only be a reasonable interpretation to survive. The *McMahon* factors provide the most appropriate evaluation of a permissible construction for the current question at issue.

The Supreme Court has held that the FAA establishes a strong presumption in favor of the enforceability of arbitration agreements.³⁰⁶ Only a contrary congressional command can override the dictates of the FAA.³⁰⁷ The *McMahon* Court held that such a contrary congressional command would be deducible from (1) the text of the statute in question, (2) the statute’s legislative history, or (3) “from an inherent conflict between arbitration and the statute’s underlying purposes.”³⁰⁸

The text of the MMWA weighs in favor of affirming the FTC’s interpretation, although it does not explicitly mention binding arbitration. The text creates Mechanisms to “fairly and expeditiously” settle consumer warranty disputes.³⁰⁹ Congress crafted Mechanisms as an efficient and cost-effective prerequisite to seeking a legal remedy.³¹⁰ The Supreme Court has found a preference for arbitration over litigation, in large part, due to the improved efficiency and cost-effectiveness of the process. And Mechanisms are more efficient and cost-effective than arbitration. Furthermore, Congress granted incentives to encourage Mechanism use, implying a preference over alternatives.³¹¹ Therefore, it follows that Congress preferred Mechanisms over arbitration.

Congress could not have intended to create ineffectual incentives for employing Mechanisms. There was no other reason to provide such incentives if Congress did not intend their use. To give these express congressional incentives effect, it was necessary to preclude binding arbitration in written warranties under the MMWA.

The legislative history of the MMWA is not as helpful here. Since Congress did not consider binding arbitration, there was no discussion of binding arbitration in the legislative history. Although the absence of any arbitration discussion tends to weigh in favor of overturning the FTC’s interpretation, there is also nothing in the legislative history that affirmatively hurts the FTC’s position.

The final *McMahon* factor weighs in favor of the FTC’s interpretation. Pre-dispute binding arbitration inherently conflicts with the MMWA’s purposes. The stated purposes of the MMWA include “improv[ing] the adequacy of information available to consumers, prevent[ing] deception, and improv[ing]

³⁰⁵ *Chevron*, 467 U.S. at 844.

³⁰⁶ *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983).

³⁰⁷ *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987).

³⁰⁸ *Id.* at 226–27.

³⁰⁹ 15 U.S.C. § 2310(a)(1) (2012).

³¹⁰ *Id.* § 2310(a)(3)(C).

³¹¹ *Id.*

competition in the marketing of consumer products.”³¹² Although these purposes do not necessarily conflict with arbitration, Congress created Mechanisms as a tactic to achieve these ends and to improve the remedial process under the MMWA. Furthermore, Congress stated its policy “to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms.”³¹³ By eliminating Congress’s incentives to encourage Mechanism use, pre-dispute binding arbitration effectively eliminates Mechanisms. And eliminating Mechanisms cuts directly against Congress’s goal of “encourag[ing] warrantors to establish” Mechanisms.

Based on a review of the *McMahon* factors, it appears the FTC’s construction of the MMWA is permissible. The text of the MMWA and arbitration’s inherent conflict with the statute weigh heavily in favor of affirming the FTC’s interpretation. The legislative history of the statute—by failing to mention binding arbitration—weighs only slightly against the interpretation.

In conclusion, the *Chevron* test, with the substituted arguments, would likely support the FTC’s interpretation of the MMWA. Congress did not directly speak to the issue of binding arbitration in consumer warranties, and the FTC’s construction is permissible in consideration of the *McMahon* factors for overriding the policy of the FAA.

CONCLUSION

The Ninth Circuit’s decision in *Kolev v. Euromotors West/The Auto Gallery* correctly affirmed the FTC’s interpretation prohibiting pre-dispute binding arbitration in written warranties. The reasoning the Ninth Circuit used to arrive at that conclusion, however, was incorrect. The court based much of its reasoning on the FTC’s regulations. The FTC could have avoided legal challenges to the arbitration prohibition by altering its unclear language and weak reasoning in support of the prohibition. The courts that supported the FTC’s interpretation have been hampered by this unclear language and weak reasoning as well.

The FTC (and courts) improperly conflated informal dispute settlement mechanisms with any possible alternative dispute resolution remedy. The MMWA clearly makes such Mechanisms optional, so the FTC could not reasonably justify the arbitration prohibition by using congressional intent to make Mechanisms non-binding. The FTC (and courts) also improperly reasoned that binding arbitration could be prohibited to protect consumers. The Supreme Court’s arbitration jurisprudence makes it clear that arbitration cannot be treated with suspicion or hostility. Therefore, the FTC required some justification for prohibiting arbitration other than what it proffered.

This Note provides that justification by arguing that arbitration renders Mechanisms under the MMWA ineffectual. Congress provided incentives to warrantors that adopt Mechanisms. The benefits afforded to warrantors in pre-dispute binding arbitration swallow the benefits of Mechanisms, thereby negating any encouragement Congress attempted to provide. Congress could not

³¹² *Id.* § 2302(a).

³¹³ *Id.* § 2310(a)(1).

have intended the Mechanism section of the MMWA to be without force or effect. Therefore, the FTC properly precluded binding arbitration in warranties because it implemented Congress's intent.

Although the Ninth Circuit panel in *Kolev* withdrew its opinion and avoided the circuit split, courts that consider the issue in the future should find success upholding the FTC's interpretation by bolstering their opinions with the arguments outlined herein.