Arbitration of Magnuson-Moss Warranty Act Claims

by David A. Hirsch

Although federal public policy strongly favors alternative dispute resolution[1] and Virginia's public policy follows suit,[2] when it comes to the Magnuson-Moss Warranty Act (MMWA or the Act), courts have been divided regarding arbitrability.[3] While courts at the federal level have found that arbitration can be preempted by another federal statute,[4] many federal claims *can* be compelled to arbitration.[5] Two cases potentially block the path to arbitration of MMWA claims in Virginia, but these cases have misconstrued the law.

In *Browne v. Kline Tysons Imports*,[6] the buyer's order for the sale of a motor vehicle included an arbitration clause. The buyer filed a lawsuit for violations of the Act and state law, and the seller moved to compel arbitration. In its decision, the court ruled that all claims except the MMWA claim could be compelled to arbitration. "A clear reading of the statute evinces Congress' intent to encourage informal dispute resolution settlement mechanisms, yet not deprive any party of their right to have the written warranty dispute adjudicated in a judicial forum."[7] The court further noted that Federal Trade Commission (FTC) findings supported such a conclusion.

Coming to the same result by different analysis is *Tucker v. Ford Motor Co.*[8] *Tucker* analyzed the statutory language and the legislative history and found nothing to forbid arbitration. It wrote,

"binding arbitration does not inherently conflict with the purpose of the MMWA."

The court reviewed FTC regulatory interpretation of the Act and noted that 16 C.F.R. §703.5(j) states that any informal dispute resolution processes may *not* be binding. It found the FTC's interpretation reasonable and entitled to deference and refused to compel arbitration of the MMWA claim. It did compel arbitration of the state law claims, however, including the Virginia Lemon Law claim.[9]

The key to understanding why *Browne*, *Tucker*, and cases like them are in error is the language of 15 U.S.C. §2310(a), which encourages warrantors to use informal dispute resolution procedures.

The critical FTC regulation is 16 C.F.R. §703.5(j): "Decisions of the Mechanism shall not be legally binding on any person." "Mechanism" under the Act is the informal dispute resolution process, if any, established by a warrantor.

Neither the Act nor the FTC regulations state *what kind* of informal dispute resolution process must be used — should a warrantor *choose* to do so — so long as the process meets stated criteria, including that it be informal. The FTC's position that any such process cannot be binding is consistent with the Act; else, it would not be informal.

Neither do the Act or regulations address the nature of the subsequent "legal remedy" or "civil action" that would follow if the informal dispute resolution process failed to resolve the matter. The informal process and formal complaint are separate and distinct steps in the life of an MMWA claim.

As noted in *Walton v. Rose Mobile Homes, LLC*,[10] the United States Supreme Court has consistently approved compelled arbitration of federal statutory claims where the statutes did not expressly forbid arbitration. Citing the Supreme Court, *Walton* observed, "In order to overcome this presumption in favor of arbitration, the party opposing arbitration bears the burden of demonstrating that 'Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue.'"[11]

Walton further observed, "The MMWA does make clear that [informal dispute resolution processes] are to be used *before* filing a claim in court. Yet binding arbitration generally is understood to be a *substitute* for filing a lawsuit, not a prerequisite."[12]

Reaching the same outcome as *Walton*, *Davis v. Southern Energy Homes, Inc.,*[13] further faulted the FTC's interpretation of the Act as prohibiting arbitration: "The Supreme Court ... has held that a statute's provision for a private right of action alone is inadequate to show that Congress intended to prohibit arbitration."[14]

Abela v. General Motors Corporation[15] also compelled arbitration of an MMWA claim. The court noted that while the federal district courts were split on the issue, the federal courts of appeal that had ruled on it were unanimous in holding that MMWA claims could be compelled to arbitration. With one exception no longer applicable,[16] no federal circuit court has ruled contrary to *Walton* and *Davis*, *supra*.

In response to the split in authorities, the court in *Jones v. General Motors Corp.*[17] chose to do its own analysis. Reviewing the statute, the legislative history, and the FTC regulations, it concluded that MMWA claims could be compelled to arbitration, permitting courts or arbitrators to interpret the law where the FTC had not so acted.[18] It further observed that arbitration is often more beneficial to consumers and is thus consistent with MMWA's purpose.[19]

The *Jones* court noted that there is a substantive difference between arbitration and informal dispute settlement processes:

"The language of the MMWA ... that describes the required characteristics of an informal dispute settlement procedure provides that if a given procedure meets those requirements, then 'the consumer may not commence a civil action ... unless he *initially* resorts to such procedure,' 15 U.S.C. §2310(a)(3)(emphasis added). Thus, instead of referring to such procedures as a means of finally resolving a dispute, an informal dispute settlement procedure is meant to operate *before* the filing of a claim as a prerequisite that a warrantor may require a consumer to exhaust. The MMWA's use of the term 'informal dispute settle-

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ment procedure' therefore does not govern how formal claims, once brought, may be adjudicated."[20]

Despite any apparent obstacle, the *Browne* decision discussed above is isolated even within the Fourth Circuit. Two other district courts within the Fourth Circuit have ruled that arbitration of MMWA claims may be compelled.[21] In dicta, an appellate decision stated that the FTC regulations actually *permit* binding arbitration of MMWA claims once the informal dispute resolution process has concluded.[22]

Arbitration of MMWA claims is supported by the greater weight of authority. The federal appellate courts that have ruled on the issue have unanimously compelled arbitration, and the Fourth Circuit suggested that it would rule the same if called upon to squarely decide the issue. This is consistent with the strong public policy favoring arbitration.

The issues and facts in MMWA claims are often the same as in state law consumer claims. Decisions like *Browne* either double the cost and time to the consumer (and to the business) in pursuing common claims or force the consumer to decide between pursuing their MMWA claim and their state claims.

MMWA is a tool to apply state warranty law, not to override it.[23] Accordingly, it should complement state claims, not create division. Judicial economy and consumer protection both favor permitting MMWA claims to be compelled to arbitration when related state law claims may be as well.[24]

Endnotes:

1 *See* the Federal Arbitration Act, 9 U.S.C. Sections 1 through 16.

2 *See* the Uniform Arbitration Act, Virginia Code Sections 8.01-581.01 through 8.01-581.016 and *TM Delmarva Power, L.L.C. v. NCP of Virginia, L.L.C.*, 263 Va. 116, 122-123, 557 S.E.2d 21 199 (2002).

3 *Contrast Rickard v. Taynor's Homes, Inc.*, 279 F.Supp.2d 910 (N.D.Ohio 2003), *Koons Ford of Baltimore, Inc. v. Lobach*, 919 A.2d 722, 398 Md. 38 (2007), *Higgs v. The Warranty Group*, 2007 WL 2034376 (S.D.Ohio 2007), and *Breniser v. Western Recreational Vehicles, Inc.*, 2008 WL 5234528 (D.Oregon 2008), with *Borowiec v. Gateway 2000, Inc.*, 808 N.E.2d 957, 209 Ill.2d 376 (2004), *McDaniel v. Gateway Computer Corporation*, 2004 WL 2260497 (Court of Appeals of Ohio 2004), and *Hemphill v. Ford Motor Co.*, 206 P.3d 1, 41 Kan.App.2d 726 (2009).

4 *See, e.g., Louis v. Geneva Enterprises, Inc.*, 128 F.Supp. 2d 912 (E.D.Va. 2000), in which the Court ruled that the Fair Labor Standards Act precluded compelled arbitration of its claims.

5 *See Disston Co. v. Sandvik, Inc.*, 750 F.Supp. 745, 748-749 (W.D.Va. 1990)

6 190 F.Supp.2d 827 (E.D.Va. 2002).

7 190 F.Supp.2d at 831.

8 72 Va. Cir. 420 (Fairfax County 2007).

9 *Id.*

10 298 F.3d 470 (5th Cir. 2002).

11 298 F.3d at 473 (citation omitted).

12 298 F.3d at 475-476 (emphasis in the original).

13 305 F.3d 1268 (11th Cir. 2002).

14 305 F.3d at 1274.

15 669 N.W.2d 271, 257 Mich.App. 513 (2003).

16 The Ninth Circuit in *Kolev v. Euromotors West/The Auto Gallery*, 658 F.3d 1024 (2011) did reach a contrary result, but the Court later withdrew its opinion. *See* 676 F.3d 867 (9th Cir. 2012).

17 640 F.Supp.2d 1124 (D. Arizona 2009).

18 640 F.Supp.2d at 1137.

19 640 F.Supp.2d at 1138.

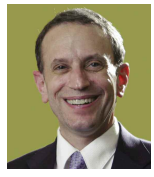
20 640 F.Supp.2d at 1140.

21 *See Seney, Inc. v. Rent-A-Center, Inc.*, 909 F.Supp.2d 444 (D.Md. 2012), and *Krusch v. Tamko Building Products, Inc.*, 34 F.Supp.3d 584 (M.D.N.C. 2014). *Seney* was affirmed on different grounds, 783 F.3d 631 (4th Cir. 2013), *cert. denied*, 134 S.Ct. 2305, 189 L.Ed.2d 176 (2014).

22 *See* 738 F.3d at 634.

23 *See Himes v. Mercedes-Benz USA, LLC*, 358 F.Supp.2d 1222 (N.D.Ga. 2005).

24 The Author thanks Mark E. Sharp and Amanda Goehring for their assistance.



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