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FEATURE ARTICLES

The Magnuson-Moss Warranty Act v. the Federal Arbitration Act: the Quintessential *Chevron* Case

By Daniel G. Lloyd*

I. Introduction

Arbitration clauses are more and more prevalent in today's commercial world.¹ Creditors and merchants prefer the arbitral forum due to the lower likelihood of exposure to large judgments, even in the wake of systematic misconduct.² Additional reasons, perhaps equally as compelling, include losing the right to a jury, the unavailability of pursuing a class action, discovery limitations, filing fees, and the inability to appeal an erroneous interpretation of law—all hindering the consumer's pursuit of redress.³ One commentator

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¹ JOHN SHELDON & CAROLYN L. CARTER, NAT'L CONSUMER LAW CTR., CONSUMER WARRANTY LAW: LEMON LAW, MAGNUSON-MOSS, UCC, MOBILE HOME, AND OTHER WARRANTY STATUTES § 10.2.1.3 (2d ed. 2001).

² *Id.*

³ *Id.* For example the consumer has a privilege to proceed in court *in forma pauperis*, see 28 U.S.C. § 1915(a)(1) (2000), whereas the American Arbitration Association consumer rules require the consumer to pay half of the arbitrator's fee, see SUPPLEMENTARY PROCEDURES FOR CONSUMER-RELATED DISPUTES C-8 (American Arbitration Association, effective on July 1, 2003), *available at*

even dubbed arbitration the “death knell” of consumer protection.⁴ Currently, the effort to avoid arbitration in a consumer setting is one of the most frequently contested issues.⁵

The Magnuson-Moss Warranty Act (“Magnuson-Moss”)⁶ is the consumer’s federal weapon to combat a breach of warranty. On its face Magnuson-Moss appears to give the consumer an “unwaivable right of access” to the judiciary for a breach of warranty claim.⁷ However, the Federal Arbitration Act (“Arbitration Act”)⁸ resides only a few volumes away in the United States Code. The Arbitration Act, conversely, requires courts to enforce agreements to arbitrate.⁹

Chief Judge King of the Fifth Circuit Court of Appeals proclaimed in her dissent in *Walton v. Rose Mobile Homes, LLC*¹⁰ that the clash between Magnuson-Moss and the Arbitration Act is a “classic *Chevron* case.”¹¹ Referring to the cornerstone administrative law case, *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.*,¹² Chief Judge King recognized that courts should defer to the Federal Trade Commission’s (“FTC” or “Commission”) longstanding view that final and binding arbitration clauses have no place near a warranty.¹³ Stated another way, the judiciary has the last word on a

<http://www.adr.org>.

⁴ Katherine R. Guerin, *Clash of the Federal Titans: The Federal Arbitration Act v. The Magnuson-Moss Warranty Act—Will the Consumer Win or Lose?*, 13 LOY. CONSUMER L. REV. 4, 21 (2001).

⁵ SHELDON & CARTER, *supra* note 1, § 10.2.1.1.

⁶ Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, §§ 101-112, 88 Stat. 2183 (1975) (codified at 15 U.S.C. §§ 2301-12 (2000)). Title II of Magnuson-Moss enhanced the scope of the FTC’s power with the purpose of allowing the agency to better protect consumers. See H.R. REP. NO. 93-1107, at 20 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7702, 7702 [hereinafter “MMWA HOUSE REP.”].

⁷ SHELDON & CARTER, *supra* note 1, § 10.2.6.5; *accord* 15 U.S.C. § 2310(a)(3).

⁸ United States Arbitration Act, Pub. L. No. 66-401, ch. 213, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-14 (2000)).

⁹ 9 U.S.C. § 2.

¹⁰ *Walton v. Rose Mobile Homes, LLC*, 298 F.3d 470 (5th Cir. 2002).

¹¹ *Id.* at 480 (King, C.J., dissenting).

¹² 467 U.S. 837 (1984).

¹³ *Walton*, 298 F.3d at 490 (King, C.J., dissenting).

Magnuson-Moss breach of warranty claim. Conversely, two federal appellate courts in 2002, the Fifth Circuit in *Walton* and the Eleventh Circuit Court of Appeals in *Davis v. Southern Energy Homes, Inc.*, held that claims under Magnuson-Moss could be subject to pre-dispute binding arbitration clauses,¹⁴ forever barring those consumers from seeking judicial redress.

The interplay between the right to bring a statutory rights claim to court and the Arbitration Act's mandate to enforce arbitration agreements is not new to American jurisprudence.¹⁵ Yet, the Supreme Court has never addressed Magnuson-Moss' relationship to the Arbitration Act,¹⁶ and only recently have lower courts begun to examine the issue.¹⁷ Prior to 2002, every federal court that addressed the issue held that Magnuson-Moss demonstrated Congress' intent to leave the consumer with a public forum for breach of warranty claims.¹⁸ State courts are jarringly divided on the issue.¹⁹

¹⁴ *Davis v. S. Energy Homes, Inc.*, 305 F.3d 1268, 1272 (11th Cir. 2002), *cert. denied*, 123 S. Ct. 1633 (2003); *Walton*, 298 F.3d at 479.

¹⁵ *See, e.g., Wilko v. Swan*, 346 U.S. 427, 430 (1953) (addressing issue of whether securities claim could be arbitrated), *overruled by Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 485 (1989).

¹⁶ *Parkerson v. Smith*, 2000-CA-00549-SCT, ¶ 9, 817 So. 2d 529, 532 (Miss. 2002).

¹⁷ *See, e.g., Wilson v. Waverlee Homes, Inc.*, 954 F. Supp. 1530, 1537 (M.D. Ala. 1997) (noting that, in 1997, the issue was new to the courts), *aff'd without opinion*, 127 F.3d 40 (11th Cir. 1997), *abrogated by Davis*, 305 F.3d at 1271-72.

¹⁸ *See, e.g., Yeomans v. Homes of Legend, Inc.*, No. 00-D-824-N, 2001 WL 237313, at *8 (M.D. Ala. Mar. 5, 2001) (upholding *Waverlee* and denying arbitration of MMWA claims); *Pitchford v. Oakwood Mobile Homes, Inc.*, 124 F. Supp. 2d 958, 965 (W.D. Va. 2000) (binding arbitration agreement between mobile home seller and consumer unenforceable as it was “[c]ontrary to the mandate of the Magnuson-Moss Act”); *Raesly v. Grand Housing, Inc.*, 105 F. Supp. 2d 562, 573 (S.D. Miss. 2000) (“binding arbitration of written warranties, in transactions to which the Magnuson-Moss Warranty Act applies, is forbidden by that Act”); *Boyd v. Homes of Legend, Inc.*, 981 F. Supp. 1423, 1441 (M.D. Ala. 1997) (holding that while non-written warranties may be subject to binding arbitration, “Congress did intend to preclude binding arbitration in the context of written warranties under certain circumstances”), *remanded on other grounds*, 188 F.3d 1294, 1300 (11th Cir. 1999) (federal district court lacked jurisdiction by considering punitive damages for amount in controversy requirement); *see also* NAT'L CONSUMER LAW CTR., CONSUMER ARBITRATION AGREEMENTS § 5.2.2.5.1 (2002).

¹⁹ *Compare Boroweic v. Gateway 2000, Inc.*, 772 N.E.2d 256, 260-61 (Ill. App. Ct. 2002), *appeal allowed*, 786 N.E.2d 181 (Ill. Oct. 2, 2002); *Parkerson*,

Only one court, however, has discussed *Chevron* in light of the Supreme Court's recent elucidations in *United States v. Mead Corp.*²⁰ and the 2002 case, *Barnhart v. Walton*.²¹ In *Rickard v. Teynor's Homes, Inc.* the United States District Court for the Northern District of Ohio followed Chief Judge King's rationale from *Walton* and held the judiciary was bound to accept the "FTC's expertise and interpretation" of Magnuson-Moss.²² Most courts that discuss *Chevron* at all either accept the regulations on face value²³ or reject them claiming unreasonableness without nary an explanation of what constitutes "unreasonable."²⁴ In short, no court has adequately explained *Chevron's* appropriate place in the context of Magnuson-Moss.²⁵ The sharp division among the lower courts will likely induce

2000-CA-00549-SCT, ¶¶ 8-21, 817 So. 2d at 532-35; *Philyaw v. Platinum Enters., Inc.*, No. CL00-236, 2001 WL 112107, at *2 (Va. Cir. Ct. Jan. 9, 2001); *with Palm Harbor Homes, Inc. v. Turner*, 796 So. 2d 295 (Ala. 2001); *S. Energy Homes, Inc. v. Ard*, 772 So. 2d 1131, 1135 (Ala. 2000); *Results Oriented, Inc. v. Crawford*, 538 S.E.2d 73, 81 (Ga. Ct. App. 2000), *aff'd*, 548 S.E.2d 342, 343 (Ga. 2001); *Howell v. Cappaert Manufactured Hous., Inc.*, 2002-0165, at 5-6 (La. App. 3 Cir. 6/5/02), 819 So. 2d 461, 464-65, *writ denied*, 2002-1870 (La. 10/25/02); *In re Am. Homestar of Lancaster, Inc.*, 50 S.W.3d 480, 492 (Tex. 2001).

²⁰ 533 U.S. 218 (2002).

²¹ 535 U.S. 212 (2002).

²² See *Rickard v. Teynor's Homes, Inc.*, No. 3:03CV7018, 2003 WL 22060320, at *8 (N.D. Ohio, Aug. 25, 2003). *Rickard* did not mention *Barnhart*, but its administrative law analysis relied on both *Chevron* and *Mead*. See *Rickard*, 2003 WL 22060320, at *8.

²³ See, e.g., *Parkerson*, 2000-CA-00549-SCT, ¶ 16, 817 So. 2d at 534 (noting that *Chevron* required the court to accept reasonable agency interpretations). It should be noted that the Mississippi Supreme Court characterized the 1999 FTC Final Action interpreting Magnuson-Moss as a "regulation." *Id.* The FTC, however, noted that its view was interpretive only, and did not carry the force of law. See Notice of Final Action, 64 Fed. Reg. 19,700, 19,700 (FTC Apr. 22, 1999) (describing the notice as "advisory in nature").

²⁴ See, e.g., *Lancaster*, 50 S.W.3d at 490-91 ("[W]hile we may defer to an agency's interpretation of the statute it administers . . . we owe no such deference when the agency's interpretation is unreasonable.").

²⁵ Commentators either have shied away from *Chevron's* import, see, e.g., 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, 241-44 (2003) (concluding judicial decisions such as *Davis* and *Walton* are flawed, but commenting only briefly on *Chevron*), or have examined *Chevron* without any substantial reference to its recent elucidations, e.g., Katie Wiechens, Comment, *Arbitrating Consumer Claims Under the Magnuson-Moss Warranty Act*, 68 U. CHI. L. REV. 1459, 1476 (2001) (concluding FTC

the Supreme Court to grant certiorari on the issue in the near future.²⁶

Professor Guerin christened the interplay between Magnuson-Moss and the Arbitration Act as the “Clash of the Federal Titans.”²⁷ However, two other federal titans will clash once the issue reaches the Supreme Court—*Chevron* and its progeny on one hand, and the “*McMahon*” inquiry,²⁸ which the Court systematically has used to strike down attempts to overcome the Arbitration Act, on the other.

Notwithstanding, neither this author, nor the FTC for that matter, argue that agreements to arbitrate Magnuson-Moss claims are always unenforceable. Such an agreement would always be permissible if entered into *post-dispute*,²⁹ just as if it were a settlement agreement. Moreover, an arbitration agreement would certainly be permissible so long as the consumer could pursue a civil action in court after the arbitral proceeding.³⁰ However, *pre-dispute* final and *binding* arbitration agreements, entered into at the time of purchase when the consumer is hardly aware of his rights upon the product’s failure, are prohibited.³¹

This article argues that the early judicial approach to the relationship between Magnuson-Moss and the Arbitration Act is flawed because of its continued ignorance of the proper deference owed to the FTC’s regulatory interpretations of Magnuson-Moss. Part II will examine the history of judicial deference to administrative agency statutory interpretation, specifically focusing on *Chevron* and its most recent elucidations. Part III will discuss the relationship between Magnuson-Moss and its corresponding FTC regulations and interpretations. Part IV will examine the history of the Arbitration

regulations are not entitled to any deference because they are contrary to Congress’ intent in the Arbitration Act).

²⁶ See *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 285 (2002); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 225 (1987). Although the Supreme Court denied certiorari in *Davis*, see 123 S. Ct. 1633 (2003), this author predicts that the Court will eventually address the issue as more and more appellate courts produce conflicting views.

²⁷ Guerin, *supra* note 4, at 4.

²⁸ See *McMahon*, 482 U.S. at 226-27.

²⁹ *Accord* Disclosure of Written Consumer Product Warranty Terms and Conditions, Pre-Sale Availability of Written Warranty Terms, and Informal Dispute Settlement Mechanisms, 40 Fed. Reg. 60,168, 60,211 (FTC Dec. 31, 1975) [hereinafter “FTC IDSM Promulgation”].

³⁰ See *infra* Part III.B.2.

³¹ See *infra* Part V.

Act along with the jurisprudence addressing the arbitrability of rights grounded in federal law. Finally, Part V will combine Magnuson-Moss and corresponding FTC regulations with the correct *Chevron* approach, demonstrating that a proper consideration of *Chevron* adequately resolves this quandary that seems to have plagued recent decisions. It will also argue that Magnuson-Moss overrides the Arbitration Act's mandate even using the traditional three-factor inquiry the Supreme Court employs.

II. Judicial Deference and the *Chevron* Doctrine

Chief Justice Marshall pronounced long ago that it was "emphatically the province and duty of the judicial department to say what the law is."³² Nevertheless, the complexity of a statutory scheme often leaves a court with no option but to defer to the expertise and interpretation of an administrative agency.³³ Even Chief Justice Marshall himself recognized after *Marbury v. Madison* that courts should respect an executive department's view.³⁴ Essentially, Congress enacts a statute setting general guidelines and gives the agency the power to "fill up the details."³⁵ The Supreme Court recognized as early as 1896 that courts should give the utmost respect to an agency's construction of its enabling statute, especially when the act is susceptible to more than one interpretation.³⁶ The case of *Webster v. Luther*, while instructing courts to follow the agency interpretation in doubtful cases,³⁷ held that an agency still could not construe an act of Congress in a manner that would render the underlying purpose of the statute meaningless.³⁸ Nevertheless, the Court has recognized that certain statutory schemes require administrative agencies to promulgate regulations and form policies to fill any gaps left by Congress.³⁹

³² *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (Marshall, C.J.).

³³ *Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc.*, 470 U.S. 116, 125 (1984).

³⁴ *United States v. Vowell & M'Clean*, 9 U.S. (5 Cranch) 368, 372 (1809) (Marshall, C.J.).

³⁵ *United States v. Grimaud*, 220 U.S. 506, 517 (1911).

³⁶ *Webster v. Luther*, 163 U.S. 331, 342 (1896).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Morton v. Ruiz*, 415 U.S. 199, 231 (1974).

A. *Chevron* as the Trendsetter in Administrative Law

The Supreme Court case, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,⁴⁰ dubbed by a leading treatise as “one of the most important decisions in the history of administrative law,”⁴¹ set the standard for the level of deference owed to an agency interpretation. In *Chevron* the Court addressed the specific issue of whether an Environmental Protection Agency (“EPA”) construction of the term “stationary sources” was within Section 172(b)(6) of the Clean Air Act Amendments of 1977.⁴² The Court ultimately held that the EPA’s decision to permit states to group all pollution-emitting devices within an industry as though encased in a single “bubble” was a reasonable construction of the Clean Air Act Amendments as it was grounded in policy.⁴³

Chevron is known for two major contributions to administrative law, both of which are relevant to resolving the Magnuson-Moss/Arbitration Act controversy: first, it established what is commonly referenced as the “*Chevron* two-step”;⁴⁴ second, and perhaps more important, Justice Stevens’ opinion for a unanimous court⁴⁵ established the level of deference a court should give an agency interpretation.⁴⁶

The *Chevron* two-step refers to the two questions a court faces when reviewing an agency’s construction of the statute it is entrusted to administer.⁴⁷ The first question is whether Congress has

⁴⁰ 467 U.S. 837 (1984).

⁴¹ 1 KENNETH C. DAVIS & RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE § 3.2, at 110 (3d ed. 1994), cited with approval in *Barnhart v. Walton*, 535 U.S. 212, 222 (2002).

⁴² *Chevron*, 467 U.S. at 839-40. The statutory provision may be found at Pub. L. No. 95-95, 91 Stat. 685, 747 (1977) (codified as amended at 42 U.S.C. § 7502(c)(5) (2000)).

⁴³ *Chevron*, 467 U.S. at 840, 863-65.

⁴⁴ E.g., *Lamb v. Thompson*, 265 F.3d 1038, 1050 (10th Cir. 2001) (noting the “familiar *Chevron* two-step analysis”).

⁴⁵ The word “unanimous” here references the absence of any dissent in *Chevron*, which was a 6-0 decision. Justices Rehnquist and Marshall did not participate in the consideration or the decision, and Justice O’Connor did not participate in the resolution of the case. *Chevron*, 467 U.S. at 866.

⁴⁶ *Id.* at 844.

⁴⁷ *Id.* at 842-43.

directly addressed the particular question of concern.⁴⁸ This is appropriate because the Constitution empowers Congress—not the executive branch—to legislate the subjects Article I permits.⁴⁹ Moreover, an agency cannot lawfully promulgate any regulation that exceeds its statutorily granted authority.⁵⁰ In such a case a court must obey Congress' unambiguous intent.⁵¹ Only when the statute in question is either ambiguous or silent does the second step of *Chevron* become relevant.⁵²

The Court then delineated two separate methods Congress uses to delegate rulemaking authority to an agency. The first method is an “express delegation,” which occurs when Congress explicitly leaves a gap in the enabling act for the agency to fill by regulation.⁵³ That regulation becomes binding legal authority on the courts unless it is “arbitrary, capricious, or manifestly contrary to the statute.”⁵⁴ The other method identified by the Court is implicit delegation.⁵⁵ In such a case the rule is binding so long as it is “reasonable,” even if the court would have reached a different conclusion.⁵⁶

The Court further admonished those tempted to attack the wisdom of the agency's policy, rather than the reasonableness of its construction:

When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the

⁴⁸ *Id.*

⁴⁹ U.S. CONST. art. I, § 8.

⁵⁰ See 5 U.S.C. § 706(2)(C) (2000) (granting the courts jurisdiction to hold unlawful any regulation that exceeds statutory authority).

⁵¹ *Chevron*, 467 U.S. at 842-43.

⁵² *Id.* at 843.

⁵³ *Id.* at 843-44.

⁵⁴ *Id.* at 844.

⁵⁵ *Id.*

⁵⁶ *Chevron*, 467 U.S. at 844.

public interest are not judicial ones: “Our Constitution vests such responsibilities in the political branches.”⁵⁷

B. *Chevron’s* Evolution and *Skidmore’s* Return

Subsequent to *Chevron*, judicial deference wavered from the initial test enunciated by Justice Stevens and his colleagues. The Court produced a number of inconsistent decisions on how much respect an agency interpretation was owed.⁵⁸ In *NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co.* the Court unanimously gave controlling weight to a National Bank Act interpretation by the Comptroller of the Currency that was contained in a letter.⁵⁹ A key reason for granting *Chevron*-deference was the fact the letter represented the Comptroller’s official position, even though it did not carry the binding legal effect of a legislative regulation.⁶⁰

1. The Return of *Skidmore* and the Birth of the “Force of Law” Requirement

Conspicuously absent from the Court’s analysis in *Chevron* was any citation to *Skidmore v. Swift & Co.*,⁶¹ which provides for a level of deference the Supreme Court has recently “resurrect[ed].”⁶² Under *Skidmore* agency interpretations not meriting *Chevron*-level deference were entitled to respect depending upon their “power to persuade.”⁶³

The first indicia of *Skidmore’s* return occurred in *Christensen*

⁵⁷ *Id.* at 866 (emphasis added) (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978)).

⁵⁸ See generally Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 980-85 (1992) (illustrating that the Court deferred the same amount after *Chevron* as before *Chevron*).

⁵⁹ *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-58 (1995) (unanimous).

⁶⁰ *Id.* at 263.

⁶¹ 323 U.S. 134 (1944).

⁶² Cooley R. Howarth, Jr., *United States v. Mead Corp.: More Pieces for the Chevron/Skidmore Deference Puzzle*, 54 ADMIN. L. REV. 699, 702 (2002).

⁶³ *Skidmore*, 323 U.S. at 140.

v. Harris County,⁶⁴ where the Court held that a Department of Labor opinion letter interpreting the Fair Labor Standards Act was not entitled to *Chevron*-deference because it lacked the “force of law.”⁶⁵ The Court held those types of non-authoritative interpretations, such as agency manuals, policy statements, and enforcement guidelines, only warranted the judiciary’s respect depending on its “power to persuade.”⁶⁶ Justice Thomas, writing for the majority, hinted that formal administrative proceedings, such as formal adjudication or notice-and-comment, were required to invoke the *Chevron* level of deference.⁶⁷ However, it appeared that *Christensen* still left absent any clear line as to the extent of *Chevron*-deference.⁶⁸

The Court apparently resolved the quandary of *Chevron*’s limits the following year by reaffirming the “force of law” test in *United States v. Mead Corp.*,⁶⁹ holding that:

[A]dministrative implementation[s] of a particular statutory provision qualify[y] for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency’s power to

⁶⁴ 529 U.S. 576 (2000).

⁶⁵ *Id.* at 586-87.

⁶⁶ *Id.* at 587 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

⁶⁷ *Id.* (“Here, however, we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking.”).

⁶⁸ Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735, 745 (2002).

⁶⁹ 533 U.S. 218 (2001). The *Mead* case specifically addressed the level of deference owed to United States Customs tariff classifications. *Id.* at 221. The Court held that the classifications were not entitled to *Chevron*-deference because such classifications did not carry the force of law. *Id.* at 234-35. Nonetheless, the classifications did warrant *Skidmore*-consideration. *Id.* at 235. Justice Scalia wrote a fervent dissent, arguing that the resurrection of the intermediate *Skidmore* tier would result in “uncertainty, unpredictability, and endless litigation.” *Id.* at 250 (Scalia, J., dissenting). This comment will not remark on *Mead*’s suitability, but chooses rather to accept its 8-1 holding as settled law. It should be noted, though, that Justice Scalia would have granted *Chevron*-deference to the tariff classifications based wholly on *Chevron*’s “original formulation” despite the want of binding legal effect. *Id.* at 256-57, 261 (Scalia, J., dissenting).

engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.⁷⁰

Chevron-deference applies, according to the foregoing explication, when two circumstances are present:⁷¹ (1) Congress, either expressly or impliedly, delegated rulemaking authority to the interpreting agency; and (2) the agency interpretation was promulgated in accordance with statutory authority.⁷² Justice Souter's majority opinion therefore equated instances of explicit and implicit congressional delegation, holding that each circumstance warranted *Chevron*-deference.⁷³ Unlike cases where Congress commands the agency to fill statutory gaps by regulation, implicit delegation occurs when it is plain from an agency's "generally conferred authority and other statutory circumstances" that Congress would expect the agency to fill non-expressly delegated gaps.⁷⁴ The Court did back away from *Christensen*'s perceived formality requirement, though it recognized that formal proceedings in adjudication or rulemaking, such as notice-and-comment, serve as strong indicia of when *Chevron*-deference is due.⁷⁵ Citing *NationsBank*, Justice Souter conceded that *Chevron*-deference still applied in some circumstances where an agency interpreted a statute without notice-and-comment proceedings.⁷⁶

2. Reconciling *Chevron* and *Skidmore*

The Court did not stop by merely specifying the occurrence that would give rise to *Chevron*-deference. Resolving the ambiguity left by *Christensen*, the Court distinguished the two types of deference that a court can give to an executive statutory interpretation: the superior *Chevron*-deference and the lower

⁷⁰ *Mead*, 533 U.S. at 226-27.

⁷¹ *But see Chevron*, 467 U.S. at 842-3 (requiring that Congress "has not directly addressed the precise question at issue").

⁷² *Mead*, 533 U.S. at 226-27.

⁷³ *Id.* at 229.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 230 (citing *NationsBank*, 513 U.S. at 256-57).

Skidmore-deference.⁷⁷ According to *Mead*, *Chevron*-deference meant that the reviewing court must apply the “arbitrary and capricious” standard of reasonableness from Section 706(2)(A) of the Administrative Procedure Act.⁷⁸ Prior to *Mead*, the Supreme Court had stated that the “arbitrary and capricious” standard required the court to consider whether the administrative agency failed to base its decision on relevant factors and whether it clearly erred in judgment.⁷⁹ *Mead* was nothing more than a return to the Court’s original pronouncement in *Chevron* that a court had no discretion whatsoever to disregard a permissible agency interpretation, even if it disagreed with the executive conclusion.⁸⁰

Conversely, *Skidmore*-deference allows the referring court to consider an agency’s perspective without binding effect. The *Mead* Court quoted the Court’s unanimous opinion written by Justice Jackson in *Skidmore*, which held that judicial deference to agency interpretations not carrying the force of law “will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.”⁸¹ Simply stated, the court should consider not only the persuasiveness of the agency’s view, but also the extent of the agency’s care, the consistency in its position, the formalities observed in formulating its position, and the relative expertise the agency possesses.⁸²

3. The Current State of Judicial Deference to Executive Interpretation

One year later, the Court reaffirmed *Mead*’s disapproval of *Christensen*’s language which had apparently required notice-and-comment proceedings to invoke *Chevron*-deference.⁸³ In *Barnhart v.*

⁷⁷ *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001) (citing *Chevron*, 467 U.S. 837; *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

⁷⁸ *Id.* at 227 & n.6; *see also* 5 U.S.C. § 706(2)(A) (2000).

⁷⁹ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977).

⁸⁰ *See Chevron*, 467 U.S. at 843.

⁸¹ *Mead*, 533 U.S. at 228 (quoting *Skidmore*, 323 U.S. at 140).

⁸² *Id.* (citations omitted).

⁸³ *Barnhart v. Walton*, 535 U.S. 212, 222 (2002).

Walton the Court deferred to the Social Security Administration's interpretation of its enabling act.⁸⁴ Applying the *Chevron* two-step, the Court accepted the agency's imposition of a twelve-month requirement for someone to qualify for an "inability" under the Social Security Act.⁸⁵ The Court reasoned that the agency construction made sense, especially in light of its reflection of the agency's longtime view.⁸⁶ In particular the Court stated it granted unique deference to an agency interpretation that remained the executive view over an extended period.⁸⁷

Hence, agency statutory interpretation currently follows the original *Chevron* pronouncement: look first to whether Congress' express intent on the precise issue is present; if that is not present, the court must then give binding effect to the agency interpretation if it carries the force of law, unless it was promulgated without reason.⁸⁸ Moreover, courts still must accept an interpretation regardless of its form if it represents the "official view" of the agency and it carries the force of law. Each of these conditions is present with Magnuson-Moss.

III. The Magnuson-Moss Warranty Act and the Federal Trade Commission's Role Within

A. The Creation of a Comprehensive Federal Warranty Scheme

The Magnuson-Moss Warranty Act is a federal remedial statute aimed at protecting consumers from unscrupulous warrantors.⁸⁹ Most of the statute's stringent requirements apply only to written warranties,⁹⁰ thereby excluding other types of express

⁸⁴ *Id.* at 217.

⁸⁵ *Id.* at 218-19.

⁸⁶ *Id.* at 219-20.

⁸⁷ *Id.* Notably, the Court reaffirmed *Chevron* and *Barnhart* later in 2002, holding the Interstate Commerce Commission's ("ICC") interpretation of the Intermodal Surface Transportation Efficiency Act was reasonable and therefore gave deferential weight to the ICC's interpretation of the ambiguous statute. *Yellow Transp., Inc. v. Michigan*, 537 U.S. 36, 46 (2002).

⁸⁸ *Barnhart*, 535 U.S. at 217-18; *Mead*, 533 U.S. at 227-28; *Chevron*, 467 U.S. at 842-43.

⁸⁹ *Skelton v. Gen. Motors Corp.*, 660 F.2d 311, 313 (7th Cir. 1981).

⁹⁰ 15 U.S.C. §§ 2302-04 (2000).

warranties available under Article 2 of the Uniform Commercial Code (“UCC”).⁹¹ Congress enacted Magnuson-Moss in 1974 to “improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products.”⁹² One could say that these purposes share the common thread of disclosure.⁹³ The driving force behind Magnuson-Moss’ enactment rested on over twenty years of examination by the FTC of warranties, primarily with respect to automobiles and home appliances.⁹⁴ The scope of Magnuson-Moss is much broader though, as the act applies to “any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes (including any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed),” collectively referred to as “consumer products.”⁹⁵

Magnuson-Moss requires any warrantor to describe its warranty as either full or limited, with restrictions applying to each type.⁹⁶ Prior to Magnuson-Moss, a consumer’s only remedies for a warranty breach existed in the common law and UCC.⁹⁷ One of the

⁹¹ See U.C.C. § 2-313(1) (2001). The UCC definition of express warranties subsumes any affirmation of fact, description, model, or sample of the goods that becomes the basis of the bargain. *Id.* Consequently, its scope is much broader than that of Magnuson-Moss.

⁹² 15 U.S.C. § 2302(a).

⁹³ See *infra* Part V.B.3.

⁹⁴ See MMWA HOUSE REP., *supra* note 6, at 25-28, *reprinted in* 1974 U.S.C.C.A.N. at 7708-11.

⁹⁵ 15 U.S.C. § 2301(1). This article does not address the issue of precisely what qualifies as a “consumer product.” Suffice to say that courts have varied in their approach to how a specific product’s use brings it within the ambit of Magnuson-Moss’ scope. The majority of jurisdictions hold that a product’s normal use (i.e. how most persons use the product) determines the Act’s applicability rather than how the specific product is actually used. See *Cinquergrani v. Sandel Avionics*, No. 01-C-1805, 2001 WL 649488, at *2 (N.D. Ill. June 8, 2001) (citations omitted). *Contra* *Lipham v. Gen. Motors Corp.*, 665 So. 2d 190, 194 (Ala. 1995) (holding the specific product’s actual use determines Magnuson-Moss’ applicability).

⁹⁶ 15 U.S.C. § 2303(a). Some of the other requirements are quite rigid, including a prohibition of a warrantor issuing a “full warranty” from disclaiming implied warranties, such as merchantability or fitness for purpose, see U.C.C. §§ 2-314 (merchantability), -315 (fitness for particular purpose). 15 U.S.C. § 2304(a)(2).

⁹⁷ MMWA HOUSE REP., *supra* note 6, at 24, *reprinted in* 1974 U.S.C.C.A.N.

key additions of Magnuson-Moss to warranty enforcement was the remedial provision awarding costs and attorneys' fees to a prevailing consumer,⁹⁸ a benefit generally not available under state law unless the parties specifically agree as such.⁹⁹ As a result, consumers can pursue their breach of warranty claims without fear of the court costs subsuming the award.

Magnuson-Moss does not mandate that any manufacturer issue a written warranty.¹⁰⁰ Rather, it requires that if a warrantor issues a written warranty, it must disclose all terms "fully and conspicuously."¹⁰¹ Congress directed the FTC to determine the extent of that disclosure,¹⁰² which undoubtedly epitomizes *Chevron's* description of an "express delegation" by Congress to fill a statutory gap.¹⁰³

B. Informal Dispute Settlement Procedures Under Magnuson-Moss

Of specific importance to arbitration is a congressional policy declaration to promote the use of "informal dispute settlement mechanisms," a policy embedded in Magnuson-Moss' remedial scheme.¹⁰⁴ Congress intended that a totally impartial adjudicator decide disputes between consumers and warrantors, especially where a warrantor desired an informal dispute settlement proceeding prior to any civil action.¹⁰⁵ To effectuate its policy, Congress provided a three-part requirement by which an informal dispute settlement mechanism could serve as a prerequisite to a civil action: (1) the warrantor must set up the mechanism; (2) the warrantor must ensure the mechanism complies with FTC regulations; and (3) the written warranty includes a provision "that the consumer resort to such procedure before pursuing any legal remedy under this section

at 7706.

⁹⁸ 15 U.S.C. § 2310(d)(2).

⁹⁹ See U.C.C. § 2-719 (2001); SHELDON & CARTER, *supra* note 1, § 10.8.

¹⁰⁰ See *Skelton*, 660 F.2d at 314.

¹⁰¹ 15 U.S.C. § 2302(a).

¹⁰² See *id.*

¹⁰³ See *Chevron*, 467 U.S. at 843.

¹⁰⁴ 15 U.S.C. § 2310(a)(1).

¹⁰⁵ MMWA HOUSE REP., *supra* note 6, at 40, reprinted in 1974 U.S.C.C.A.N. at 7722.

respecting such warranty.”¹⁰⁶ The decision of the mechanism would be admissible evidence in any subsequent judicial proceeding.¹⁰⁷

1. Arbitration’s place as an “informal dispute settlement mechanism”

Magnuson-Moss does not expressly define “informal dispute settlement mechanism.”¹⁰⁸ However, the FTC characterized the term as “an informal dispute settlement procedure which is incorporated into the terms of a written warranty to which any provision of [Magnuson-Moss] applies.”¹⁰⁹ For instance, a warrantor may establish a mediation procedure or any separate board to resolve disputes.¹¹⁰ In fact one court recently held that one type of a procedure initiated under FTC regulations did not even invoke the Arbitration Act.¹¹¹

At least one commentator has argued that binding arbitration does not fall within the FTC’s definition.¹¹² The word “arbitration” appears nowhere in Magnuson-Moss or the FTC regulations.¹¹³ Some courts holding that Magnuson-Moss may be arbitrated have relied heavily on this absence.¹¹⁴ However, such a view runs afoul of the

¹⁰⁶ 15 U.S.C. § 2310(a)(3)(A)-(C).

¹⁰⁷ *Id.* § 2310(a)(3).

¹⁰⁸ *See id.* § 2301 (defining relevant terms for Magnuson-Moss but refraining from defining “informal dispute settlement mechanism”).

¹⁰⁹ 16 C.F.R. § 703.1(e) (2003).

¹¹⁰ *See* SHEDDON & CARTER, *supra* note 1, § 10.2.1.2.

¹¹¹ *See* Harrison v. Nissan Motor Corp., 111 F.3d 343, 351 (3d Cir. 1997).

¹¹² *See, e.g.,* Wiechens, *supra* note 25, at 1472-74 (opining that arbitration is excluded from the FTC’s authority to regulate informal dispute resolution procedures); *see also* Ryan Kauffman, Note, Cunningham v. Fleetwood Homes of Georgia, Inc.: Will Consumers Be Required to Arbitrate Their Magnuson-Moss Claims?, 19 T.M. COOLEY L. REV. 361, 383 (2002) (quoting Wiechens, *supra* note 25, at 1469). Wiechens also believes the FTC regulations have no place within the *McMahon* framework nor are entitled to any deference under *Chevron*. *See* Wiechens, *supra* note 25, at 1469-79. As discussed *infra*, this analysis is flawed.

¹¹³ *See* 15 U.S.C. §§ 2301-12; 16 C.F.R. pts. 700-03.

¹¹⁴ *See, e.g.,* Walton v. Rose Mobile Homes, LLC, 298 F.3d 470, 475 (5th Cir. 2002) (“The text of the MMWA does not specifically address binding arbitration”); *In re* Am. Homestar of Lancaster, Inc. 50 S.W.3d 480, 487 (Tex. 2001) (“[N]either the Magnuson-Moss Act nor the FTC regulations mention arbitration or the FAA.”).

basic understanding of arbitration. On several occasions the Supreme Court has acknowledged the informal nature of arbitration.¹¹⁵ In *Alexander v. Gardner-Denver, Inc.* decided months before Magnuson-Moss was enacted,¹¹⁶ the Court compared the arbitral forum with its judicial counterpart:

Moreover, the factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable. . . . And as this Court has recognized, '[a]rbitrators have no obligation to the court to give their reasons for an award'. . . . Indeed, *it is the informality of arbitral procedure* that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution.¹¹⁷

The National Consumer Law Center has dubbed “untenable” any attempt to distinguish arbitration from Magnuson-Moss’ informal dispute settlement mechanisms.¹¹⁸ The FTC concurs, dubbing a mechanism as any “non-judicial proceeding.”¹¹⁹ The Supreme Court defers to an agency’s interpretation of its own regulation,¹²⁰ consequently dispelling any notion that arbitration is not subsumed in

¹¹⁵ See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (recognizing “informality” as a benefit of arbitration) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)); *Alexander v. Gardner-Denver*, 415 U.S. 36, 57-58 (1974) (noting informality as an essential characteristic of arbitration); *United Steelworkers of Am. v. Warrior & Gulf Navigation*, 363 U.S. 574, 578 (1960) (describing arbitration as an “informal . . . tribunal”).

¹¹⁶ Magnuson-Moss was signed into law on January 4, 1975, see 88 Stat. at 2203, whereas *Gardner-Denver* was decided February 19, 1974, see 415 U.S. at 36.

¹¹⁷ *Gardner-Denver*, 415 U.S. at 57-58 (alteration in original) (emphasis added) (citations omitted); Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, §§ 101-112, 88 Stat. 2183 (1975) (codified at 15 U.S.C. §§ 2301-12 (2000)).

¹¹⁸ SHELTON & CARTER, *supra* note 1, § 10.2.6.7.

¹¹⁹ FTC IDSM Promulgation, *supra* note 29, at 60,210.

¹²⁰ *Barnhart v. Walton*, 535 U.S. 212, 217 (2002) (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

the definition of "mechanism."¹²¹

2. Distinguishing Between Binding and Non-binding Arbitration

Non-binding arbitration and other alternative dispute resolution procedures are not only permissible, but also encouraged under Magnuson-Moss.¹²² No court or party with a sensible mind would ever argue to the contrary, especially in light of Congress' codified policy in Magnuson-Moss encouraging informal dispute resolution.¹²³ Non-binding arbitration is simply a prerequisite, but not a bar, to a judicial proceeding.¹²⁴ In other words the arbitral forum under Magnuson-Moss may be an additional hurdle prior to, but not in lieu of, a civil action.¹²⁵

C. The FTC's Role in Enforcing Magnuson-Moss

Congress delegated to the FTC unique, plenary power to authoritatively interpret Magnuson-Moss to ensure fulfillment of the Act's purposes.¹²⁶ Section 102(a) of Magnuson-Moss expressly requires the FTC establish the minimum requirements for the ingredients in any written warranty.¹²⁷ Moreover, Congress explicitly

¹²¹ *Accord Lamis, supra* note 25, at 189-95.

¹²² *SHELDON & CARTER, supra* note 1, § 10.2.1.2; *see also* 15 U.S.C. § 2310(a)(3).

¹²³ 15 U.S.C. § 2310(a)(1).

¹²⁴ *See Wilson v. Waverlee Homes, Inc.*, 954 F. Supp. 1530, 1537 (M.D. Ala. 1997), *aff'd without opinion*, 127 F.3d 40 (11th Cir. 1997), *abrogated by Davis v. S. Energy Homes, Inc.*, 305 F.3d 1268, 1271-72 (11th Cir. 2002).

¹²⁵ *Accord SHELDON & CARTER, supra* note 1, § 10.2.6.2 (stating that Magnuson-Moss "makes the [informal dispute settlement procedures] a non-binding exhaustion requirement rather than substitute for litigation").

¹²⁶ 15 U.S.C. §§ 2302(a), 2310(a)(2).

¹²⁷ Section 102(a) states:

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

delegated to the FTC the task of filling the statutory gaps with respect to any informal dispute settlement proceeding.¹²⁸

The FTC obeyed Congress, establishing the minimum requirements of any warranty or mechanism.¹²⁹ Two sets of regulations eventually emerged: (1) substantive regulations regarding the content of warranties and mechanism procedures,¹³⁰ and (2) interpretive regulations.¹³¹

The agency prescribes that all warrantors must “clearly and conspicuously disclose in a single document in simply and readily understood language” various terms,¹³² including the warrantor’s identity,¹³³ the process by which a defect is cured,¹³⁴ the warranty’s duration,¹³⁵ and a description of any informal dispute settlement proceeding established by the warrantor.¹³⁶

However, the rule most antagonistic to binding arbitration appears in the “interpretive” portion of the Magnuson-Moss regulations,¹³⁷ but it nonetheless carries the force of law.¹³⁸ Section 700.8 of these regulations states:

15 U.S.C. § 2302(a).

¹²⁸ Section 110(a)(2) of Magnuson-Moss requires the FTC 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 [Magnuson-Moss] applies. Such rules shall provide for participation in such procedure by independent or governmental entities.” *Id.* § 2310(a)(2).

¹²⁹ *See* 16 C.F.R. pts. 700-703 (2003).

¹³⁰ *See id.* pts. 701-03.

¹³¹ *See id.* pt. 700.

¹³² 16 C.F.R. § 701.3(a).

¹³³ *Id.* § 701.3(a)(1).

¹³⁴ *Id.* § 701.3(a)(3).

¹³⁵ *Id.* § 701.3(a)(4).

¹³⁶ *Id.* § 701.3(a)(6).

¹³⁷ 16 C.F.R. pt. 700 (2003).

¹³⁸ The generally accepted test for whether a rule has legal effect or is merely interpretive is two-fold: (1) whether the rule has any present effect; and (2) whether the agency has some discretion in its application. *See Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1046 (D.C. Cir 1987) (citations omitted). Section 700.8 has both present effect because of its “shall not” language and the FTC did not leave any room for the rule’s application. In light of Magnuson-Moss’ acceptance of the rule as tantamount to law, *see* 15 U.S.C. § 2310(b), the regulation is substantive in effect.

A warrantor shall not indicate in any written warranty or service contract either directly or indirectly that the decision of the warrantor, service contractor, or any designated third party is final or binding in any dispute concerning the warranty or service contract. Nor shall a warrantor or service contractor state that it alone shall determine what is a defect under the agreement. Such statements are deceptive since section 110(d) of the Act gives state and federal courts jurisdiction over suits for breach of warranty and service contract.¹³⁹

Regarding the actual substantive regulations applicable to the “mechanisms,” the FTC prohibited any warrantor from making a mechanism a bar to a civil action.¹⁴⁰ Furthermore, the FTC requires the warrantor to use the warranty as a means of informing the consumer that the mechanism’s decision is non-binding.¹⁴¹

In 1975 the FTC promulgated Part 703, the set of rules addressing informal dispute settlement mechanisms, and examined the legitimacy of the claim that Magnuson-Moss allowed “binding arbitration.”¹⁴² The Commission rejected industry contentions to allow for “binding arbitration” for two reasons. First, the FTC noted Congress’ intent that all non-judicial proceedings be “non-binding.”¹⁴³ Second, the FTC pronounced a policy statement rejecting any coercion to set up guidelines for binding arbitration procedures:

The Commission is not prepared, at this point in time, to develop guidelines for a system in which consumers would commit themselves, *at the time of purchase*, to resolve any difficulties in a binding, but non-judicial, proceeding. The Commission is not now convinced that any guidelines which it set out could ensure sufficient protection for consumers.¹⁴⁴

Additionally, the FTC dismissed a belief that Part 703 would never

¹³⁹ 16 C.F.R. § 700.8 (emphasis added).

¹⁴⁰ *Id.* § 703.5(j) (“Decisions of the Mechanism shall not be legally binding on any person.”).

¹⁴¹ *Id.* § 703.5(g)(1).

¹⁴² See FTC IDSM Promulgation, *supra* note 29, at 60,210.

¹⁴³ *Id.*

¹⁴⁴ *Id.* (emphasis added).

allow for binding arbitration. The Commission noted that binding arbitration would be permissible, but only *after* the dispute had arisen.¹⁴⁵

In 1996 and 1997 the FTC requested commentary regarding its interpretive and substantive regulations under Magnuson-Moss.¹⁴⁶ The Commission accepted these remarks and responded on April 22, 1999, with its final interpretations of the Magnuson-Moss Warranty Act, electing to leave both Section 700.8 (Warrantor's Decision as Final) and Part 703 (Informal Dispute Settlement Mechanisms) unchanged.¹⁴⁷

The FTC reiterated two important aspects regarding pre-dispute binding arbitration clauses. First, the FTC reaffirmed that "arbitration" was a possible "informal dispute settlement mechanism" under Magnuson-Moss.¹⁴⁸ Second, the Commission confirmed its policy of "prohibit[ing] warrantors from including binding arbitration clauses in their contracts with consumers that would require consumers to submit warranty disputes to binding arbitration," relying in part on its policy statement regarding the establishment of binding arbitration guidelines.¹⁴⁹

IV. Federal Arbitration Act and the Three-Part *McMahon* Test

Congress enacted the Arbitration Act in 1925 in response to a wave of judicial hostility toward arbitration contracts that originated in the English common law.¹⁵⁰ The goal was to bring any agreement to arbitrate on the "same footing" as any other contract.¹⁵¹ The operative section of the Arbitration Act provides that any written

¹⁴⁵ *Id.* at 60,211.

¹⁴⁶ See Requests for Comments Concerning Interpretations of Magnuson-Moss Warranty-Act, 61 Fed. Reg. 14,688, 14,688 (FTC Apr. 3, 1996) and Request for Comments Concerning Rule Governing Informal Dispute Settlement Procedures, 62 Fed. Reg. 15,636, 15,636 (FTC Apr. 2, 1997).

¹⁴⁷ See Final Action Concerning Review of Interpretations of Magnuson-Moss Warranty Act, 64 Fed. Reg. 19,700, 19,703, 19,707 (FTC Apr. 22, 1999).

¹⁴⁸ *Id.* at 19,708 & n.67 (equating "arbitration" with a 703 mechanism).

¹⁴⁹ *Id.* at 19,708-09.

¹⁵⁰ *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 288-89 (2002) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991)); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111 (2001).

¹⁵¹ *Id.*

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.”¹⁵² The Court has construed this section to evince a “liberal federal policy favoring arbitration agreements,”¹⁵³ which invokes a judicial duty to enforce arbitration agreements even in the face of a statutory rights claim normally left for the courts.¹⁵⁴ However, this should not be confused with a federal policy favoring arbitration in every case. The Supreme Court stated quite clearly that the goal of the Arbitration Act was not to endorse the non-judicial resolution of every dispute; rather, it was merely to advance a policy enforcing “privately negotiated arbitration agreements.”¹⁵⁵

A. The *McMahon* Inquiry

Nonetheless, this policy is not insurmountable. Before the Arbitration Act even becomes relevant, substantive arbitrability is decided by a court using ordinary contract construction principles to determine whether the parties bargained for final arbitration in lieu of judicial adjudication.¹⁵⁶ In other words the first inquiry a court undertakes is to determine whether the parties agreed to arbitrate.¹⁵⁷ If the agreement developed in light of “overwhelming economic power that would provide grounds” for revoking the contract, the court must, and should, disregard the arbitration clause.¹⁵⁸

Even if the parties are at arms’ length, Congress has the power to supersede the Arbitration Act’s mandate at any time, just as

¹⁵² 9 U.S.C. § 2 (2000).

¹⁵³ *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

¹⁵⁴ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

¹⁵⁵ *Dean Witter*, 470 U.S. at 219.

¹⁵⁶ *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). Certainly, parties may also agree that substantive arbitrability is for the arbitrator to decide, but that would be a separate agreement that a court should decide.

¹⁵⁷ *Mitsubishi Motors*, 473 U.S. at 626.

¹⁵⁸ *Id.* at 627 (citing 9 U.S.C. § 2).

it can with any other “statutory directive.”¹⁵⁹ In *Shearson/American Express, Inc. v. McMahon* the Supreme Court pronounced that the Arbitration Act would subsist if a party could show “Congress intended to preclude a waiver of judicial remedies.”¹⁶⁰ The burden rests solely on the party resisting arbitration.¹⁶¹ *McMahon* recognized three factors from which a court may derive such congressional intent: (1) the text of the statute; (2) the act’s legislative history; or (3) an inherent conflict between arbitration and the underlying purposes of the act granting statutory rights.¹⁶² This test is disjunctive; that is, the party seeking to avoid arbitration may show such congressional intent from any one of the three sources.¹⁶³ The Court has never stated that Congress must *explicitly* pronounce the statute in question overrides the Arbitration Act, despite the view enunciated by the *Davis* court.¹⁶⁴

B. Other Statutory Rights v. The Arbitration Act

Even before *McMahon* and in the years following, the Supreme Court routinely denied efforts to evade the Arbitration Act’s directive, siding with the Arbitration Act in its confrontations with each of the following federal statutes: the Sherman Antitrust Act (“Sherman Act”),¹⁶⁵ the Securities Act of 1933 (“Securities Act”),¹⁶⁶ the Securities Exchange Act of 1934 (“Securities Exchange Act”),¹⁶⁷ the Racketeer Influenced and Corrupt Organizations Act (“RICO”),¹⁶⁸ and the Age Discrimination in Employment Act of 1967 (“ADEA”).¹⁶⁹ Indirectly, the Court has also rejected a challenge to

¹⁵⁹ *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987).

¹⁶⁰ *Id.* at 227.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *See id.* (using the disjunctive word “or” instead of the conjunctive word “and”).

¹⁶⁴ *See Davis*, 305 F.3d at 1273.

¹⁶⁵ *Mitsubishi Motors*, 473 U.S. at 636.

¹⁶⁶ *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 483-84 (1989) (overruling *Wilko v. Swan*, 346 U.S. 427 (1953)).

¹⁶⁷ *McMahon*, 482 U.S. at 227-38.

¹⁶⁸ *Id.* at 238-42.

¹⁶⁹ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26-35 (1991).

avoid arbitration under the Truth in Lending Act (“TILA”).¹⁷⁰ In spite of this freight train against judicial adjudication, Magnuson-Moss, coupled with its corresponding FTC regulations, embodies the congressional intent the Court envisioned in *McMahon*.

Magnuson-Moss is fundamentally different from those arbitrable statutes. The Court upheld arbitration in the cases addressing the Securities Act and the Securities Exchange Act, *Rodriguez de Quijas v. Shearson/American Express, Inc.* and *McMahon*, because the statutes only contained a conferral of jurisdiction to the federal courts and provisions which prohibited waiver of any right granted by the act.¹⁷¹ Indeed, the *McMahon* Court recognized federal regulations explicitly approving binding arbitration for claims under the securities laws.¹⁷² The FTC regulations under Magnuson-Moss, on the other hand, explicitly forbid binding arbitration clauses in the warranty.¹⁷³ The Sherman Act is equally distinguishable, as the consumer’s claim to supersede the Arbitration Act does not depend exclusively on the “importance of the private damages remedy.”¹⁷⁴ RICO, the other statute considered by the *McMahon* Court, contained nothing in the text or legislative history that could even purport to show congressional intent to override the Arbitration Act, and the Court rejected the “public importance” argument analogous to the one made for the Sherman Act.¹⁷⁵

Another case cited by arbitration proponents is *Gilmer v. Interstate/Johnson Lane Corp.*,¹⁷⁶ the Supreme Court case which held

Moreover, the Court has rejected attempts to escape arbitration in other contexts. See *Circuit City Stores v. Adams*, 532 U.S. 105, 123-24 (2001) (employment contracts); *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (state tort law); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519-20 (1974) (international contracts).

¹⁷⁰ *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2001). As shown *infra* Part V.B.3, this decision does not undercut Magnuson-Moss’ usurpation of the Arbitration Act.

¹⁷¹ See *Rodriguez de Quijas*, 490 U.S. at 482-83; *McMahon*, 482 U.S. at 227-34.

¹⁷² See *McMahon*, 482 U.S. at 234.

¹⁷³ See *infra* Part V.A.

¹⁷⁴ *Mitsubishi Motors*, 473 U.S. at 635.

¹⁷⁵ *McMahon*, 482 U.S. at 238, 240 (citing *Mitsubishi Motors*, 473 U.S. at 635).

¹⁷⁶ 500 U.S. 20 (1991), discussed in *Walton v. Rose Mobile Homes, LLC*, 298

ADEA claims arbitrable.¹⁷⁷ The appellant in *Gilmer* relied *solely* on the purported social policies in the ADEA while fully conceding no congressional intent to supplant the Arbitration Act lied in the text or legislative history.¹⁷⁸ Additionally, the public disclosure problem was resolved through New York Stock Exchange rules requiring publicity of the arbitrators' decisions.¹⁷⁹ Such is not the case with binding arbitration in the consumer context.¹⁸⁰ The congressional intent sought after by the Court in *McMahon* is present in Magnuson-Moss: federal breach of warranty claims are resolved ultimately in the courts.

V. Magnuson-Moss Precludes the Consumer from Waiving the Judicial Forum

Pre-dispute arbitration clauses are illegal under Magnuson-Moss whether the clause is in the warranty itself¹⁸¹ or a different document.¹⁸² The FTC regulations make this evident in light of *Chevron's* evolution.

A. FTC Regulations that Prohibit Waiving the Judicial Forum Warrant the Highest Judicial Deference

The FTC regulations promulgated pursuant to Magnuson-Moss authority rest on par with a federal statute, as if Congress itself passed the law.¹⁸³ Accordingly, the FTC regulations, if permissible under Magnuson-Moss, must be considered under the *McMahon* inquiry.

The first question to consider is whether Congress has expressly permitted final and binding arbitration clauses for Magnuson-Moss claims.¹⁸⁴ Generally, one might argue that Congress

F.3d 470, 476 (5th Cir. 2002).

¹⁷⁷ *Id.* at 26-35.

¹⁷⁸ *Id.* at 26-28.

¹⁷⁹ *See id.* at 31-32.

¹⁸⁰ *See infra* Part V.B.3.

¹⁸¹ 16 C.F.R. §§ 700.8, 703.5(j) (2003).

¹⁸² *Id.* § 703.2.

¹⁸³ *See United States v. O'Hagan*, 521 U.S. 642, 673 (1997) (citing *Chevron*, 467 U.S. at 844).

¹⁸⁴ *See Chevron*, 467 U.S. at 842-43.

has spoken on the issue with the Arbitration Act, as it makes all arbitration agreements “valid, irrevocable, and enforceable.”¹⁸⁵ However, the first prong of the *Chevron* two-step narrows the inquiry to whether “Congress has not directly addressed the precise question at issue.”¹⁸⁶ Were there language in Magnuson-Moss expressly permitting binding arbitration, then the FTC regulations would be completely void. Such wording is not in Magnuson-Moss, properly permitting—and requiring—a court to proceed to the second *Chevron* step.

Moreover, Magnuson-Moss remained unborn fifty years after the Arbitration Act passed, and at least arguably preserves a judicial forum subsequent to any informal dispute settlement procedure under its auspices.¹⁸⁷ As some courts have recognized, the word “arbitration” does not even appear in Magnuson-Moss’ text, only the term “informal dispute settlement procedure.”¹⁸⁸ Since Magnuson-Moss is ambiguous and silent to final and binding pre-dispute arbitration, the FTC’s gap-filling regulations are controlling on the courts unless “*arbitrary, capricious, or manifestly contrary to [Magnuson-Moss].*”¹⁸⁹

1. The Weight of Deference Owed to the FTC

Over time, Congress has delegated to the FTC an uncommonly great weight of responsibility to administer the most significant federal consumer protection statutes.¹⁹⁰ The Supreme

¹⁸⁵ 9 U.S.C. § 2. This is the precise argument taken by two commentators who dismiss the FTC’s view under part one of the *Chevron* two-step. See Wiechens, *supra* note 25, at 1478, 1481; Kauffman, *supra* note 112, at 384.

¹⁸⁶ *Chevron*, 467 U.S. at 843.

¹⁸⁷ See *infra* Part V.B.1.

¹⁸⁸ See, e.g., *Walton v. Rose Mobile Homes, LLC*, 298 F.3d 470, 475 (5th Cir. 2002); *In re Am. Homestar of Lancaster, Inc.*, 50 S.W.3d 480, 487 (Tex. 2001).

¹⁸⁹ *Mead*, 533 U.S. at 227; *Chevron*, 467 U.S. at 844.

¹⁹⁰ These statutes include the Robinson-Patman Act (1936), the Wheeler-Lea Act (1938), the Consumer Credit Protection Acts (1968-78), the Magnuson-Moss Warranty Act (1975), the Hart-Scott-Rodino Antitrust Improvements Act (1976), the FTC Improvements Act of 1980, the Telephone Disclosure and Dispute Resolution Act (1992), the International Antitrust Enforcement Assistance Act (1994), and the Telemarketing and Consumer Fraud and Abuse Prevention Act (1994). See CQ Press, *2001/Winter Federal Staff Directory* 965 (35th ed. 2001).

Court long ago in *FTC v. Cement Institute*¹⁹¹ singled out the Commission as one agency deserving higher deference than other executive bureaus. Specifically, the Court explained the “great weight” it gave to FTC determinations:¹⁹²

We are persuaded that the Commission’s long and close examination of the question it here decided has provided it with precisely the experience that fits it for performance of its statutory duty. The kind of specialized knowledge Congress wanted its agency to have was an *expertise* that would fit it to stop at the threshold every unfair trade practice—that kind of practice, which if left alone, ‘destroys competition[‘]. . . .¹⁹³

This description coincidentally foreshadowed the Court’s opinion in *Mead*.¹⁹⁴ Furthermore, Title II of Magnuson-Moss expanded the FTC’s powers,¹⁹⁵ showing concurrent congressional intent to strengthen the foremost consumer protection agency.

The FTC deserves the highest deference a court can grant an agency. Magnuson-Moss exemplifies the explicit and implicit delegation expounded by the *Mead* Court.¹⁹⁶ Specifically, Congress delegated gap-filling responsibilities to the FTC with respect to warranty content and informal dispute settlement procedures.¹⁹⁷ This express delegation of authority derived from Magnuson-Moss is equally if not more explicit than the Court reviewed in *Chevron* or in any of its progeny.¹⁹⁸

Some have argued, however, that the FTC regulations should not be considered at all to resolve this issue because Magnuson-Moss

¹⁹¹ *FTC v. Cement Institute*, 333 U.S. 683, 720 (1948), *cited for same proposition in* *United States v. Mead Corp.*, 533 U.S. 218, 251 n.4 (2001) (Scalia, J., dissenting).

¹⁹² *Id.* (citations omitted).

¹⁹³ *Id.* (citing *FTC v. Raladam Co.*, 283 U.S. 643, 647, 650 (1931)).

¹⁹⁴ *See Mead*, 533 U.S. at 227-28.

¹⁹⁵ Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, Title II, 88 Stat. 2183, 2193-2203 (1975) (codified as amended throughout Title 15, U.S.C. (2000)); *see also* MMWA HOUSE REP., *supra* note 6, at 20, *reprinted in* 1974 U.S.C.C.A.N. at 7702.

¹⁹⁶ *See* discussion and notes *supra* Part III.B-C.

¹⁹⁷ 15 U.S.C. §§ 2302(a), 2310(a)(2).

¹⁹⁸ *See Chevron*, 467 U.S. at 839-40.

does not give the FTC the power to override the Arbitration Act.¹⁹⁹ This view does not comport with *Chevron* and its progeny, which hold reasonable regulations promulgated under statutory authority are the functional equivalent of Congress' words—that is, they are controlling on the courts, and no court has the power to set aside the regulation merely because it disagrees with the policy.²⁰⁰ Thus, Congress can authorize an agency to override the Arbitration Act's mandate so long as the agency has authority to establish guidelines, thresholds, and prohibitions for arbitral proceedings—precisely the case with Magnuson-Moss.

2. Arbitration Clauses Inside the Warranty

Indisputably, federal regulatory law prohibits a final and binding arbitration clause located in the warranty.²⁰¹ The FTC additionally requires the warrantor to *inform* the consumer that the mechanism's decision is *non-binding*.²⁰² FTC regulations subsequently reiterate that “[d]ecisions of the Mechanism shall not be legally binding on any person.”²⁰³ By *statute*, violating any of these regulations circuitously violates the original Federal Trade Commission Act.²⁰⁴

Section 700.8, which prohibits any indication that a non-judicial decision is final and binding, declares its rationale to be the jurisdictional conferral on the courts.²⁰⁵ The *Davis* court highlighted this reasoning for the regulation's alleged illegitimacy.²⁰⁶ When a rule is promulgated under explicit or implicit congressional delegation of authority, the resulting regulation becomes the

¹⁹⁹ See Wiechens, *supra* note 25, at 1469; Kauffman, *supra* note 112, at 384 (quoting Wiechens, *supra* note 25, at 1469).

²⁰⁰ *Barnhart v. Walton*, 535 U.S. 212, 222 (2002); *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001); *Chevron*, 467 U.S. at 866.

²⁰¹ 16 C.F.R. § 700.8 (2003).

²⁰² *Id.* § 703.5(g)(1).

²⁰³ *Id.* § 703.5(j).

²⁰⁴ 15 U.S.C. § 2310(b) (“It shall be a violation of section 45(a)(1) of this title for any person to fail to comply with any requirement imposed on such person by this chapter (or a rule thereunder) or to violate any prohibition contained in this chapter (or a rule thereunder).”) (emphasis added).

²⁰⁵ 16 C.F.R. § 700.8.

²⁰⁶ *Davis*, 305 F.3d at 1279.

equivalent of congressional text: it is controlling on the courts.²⁰⁷ It is usurious at best to claim that a regulation mandating a final *public* adjudicative forum is “arbitrary, capricious, or manifestly contrary”²⁰⁸ to a *disclosure* statute. Moreover, the FTC pronounced a policy of not establishing any guidelines to aid arbitral forums that were binding in nature.²⁰⁹ As the Court stated in *Chevron*, any attempt to convince the judiciary to second-guess the agency’s policy must fail.²¹⁰

3. Arbitration Clauses Outside the Warranty

Magnuson-Moss and its corresponding FTC regulations concomitantly prohibit final and binding arbitration clauses located separate from the written warranty for two reasons. First, as one federal district court put it, “[i]t is a well-settled principle of law that one cannot do indirectly what cannot be done directly.”²¹¹ Section 700.8, plainly prohibiting final and binding arbitration clauses in the warranty, would be rendered inconsequential if creditors or merchants could circumvent the rule by placing the clause in another document.

Second, and even more convincing, is Magnuson-Moss’ directive to disclose all material terms “fully and conspicuously” *in* the warranty.²¹² Binding arbitration is a term generally held to be so material to the terms of an agreement that its unilateral insertion by a single party alters the agreement.²¹³ The non-existence of any federal contract law is irrelevant, as courts will not enforce illegal promises in cases involving federal law.²¹⁴ Arbitration clauses, due to their

²⁰⁷ *Mead*, 533 U.S. at 227-29.

²⁰⁸ *Chevron*, 467 U.S. at 844.

²⁰⁹ FTC IDSM Promulgation, *supra* note 29, at 60,210.

²¹⁰ *Chevron*, 467 U.S. at 866.

²¹¹ *In re Vitamins Antitrust Litig.*, No. 99-197, 2001 WL 849928, at *2 n.4 (D.D.C. Apr. 11, 2001).

²¹² 15 U.S.C. § 2302(a); *see also* *Cunningham v. Fleetwood Homes of Ga., Inc.*, 253 F.3d 611, 622 (11th Cir. 2001) (Magnuson-Moss requires the manufacturer to “disclose in a single document all relevant terms of the warranty.”).

²¹³ *Coastal Indus., Inc. v. Automatic Steam Prods. Corp.*, 654 F.2d 375, 379 (5th Cir. 1981); *accord* 1 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 3.37, at 507 (Joseph M. Perillo ed., rev. ed. 1993).

²¹⁴ *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 77 (1982).

materiality, would have to appear in the warranty to be enforceable under Magnuson-Moss.²¹⁵ Since final and binding arbitration clauses are flatly prohibited by reasonable regulations, they have no place near a warranty.

B. Application of the Traditional *McMahon* Inquiry

The FTC regulations are dispositive of the issue, but even if one were to disregard the regulations, Magnuson-Moss itself satisfies the *McMahon* test as it evinces congressional intent to preclude a consumer from foregoing her right to courts. Though the *McMahon* inquiry is disjunctive, Magnuson-Moss satisfies each factor.

1. Magnuson-Moss' Text

Proper statutory construction of the entire remedial section of Magnuson-Moss demonstrates congressional intent to preserve a public judicial forum. Though Magnuson-Moss does codify Congress' policy to encourage warrantors to establish informal dispute settlement procedures,²¹⁶ courts should look at the entire remedies section and "fit, if possible, all parts into an [sic] harmonious whole."²¹⁷ The Supreme Court has said that "statutory construction 'is a holistic endeavor' and that the meaning of a provision is 'clarified by the remainder of the statutory scheme . . . [when] only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.'"²¹⁸

The remedies section in Magnuson-Moss creates a cause of action for consumers injured by violations of its provisions, with concurrent jurisdiction in both the federal and state courts.²¹⁹ It is settled that this jurisdictional conferral, standing alone, would be insufficient to override the Arbitration Act.²²⁰ However, Magnuson-

²¹⁵ 15 U.S.C. § 2302(a).

²¹⁶ 15 U.S.C. § 2310(a)(1).

²¹⁷ *FTC v. Mandel Bros.*, 359 U.S. 385, 389 (1959) (citing *Black v. Magnolia Liquor Co.*, 355 U.S. 24, 26 (1957)).

²¹⁸ *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 217-18 (2001) (alteration in original) (quoting *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988)).

²¹⁹ 15 U.S.C. § 2310(d)(1).

²²⁰ *See Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 228 (1987), followed in *Rodriguez de Quijas*, 490 U.S. at 482-85.

Moss does not end there. The only blockade to a civil action a consumer would face arises *only* if the warrantor informs the consumer in the warranty that, *inter alia*, “the consumer resort to such procedure before pursuing any legal remedy under this section respecting such warranty.”²²¹ A canon of statutory construction dictates that Congress said what it meant in Magnuson-Moss and meant what the Act’s language stated.²²² Consequently, the remedial section envisions a judicial forum for the consumer after the conclusion of any informal dispute mechanism proceedings.

Additionally, Magnuson-Moss statutorily ordains that “[i]n any civil action arising out of a warranty obligation and relating to a matter considered in such a procedure, any decision in such procedure shall be admissible in evidence” to assist the federal or state court in its judicial adjudication.²²³ To ignore the one-way street from the informal decision to the judicial system “would subvert the plain meaning of the statute, making its mandatory language merely permissive.”²²⁴ Allowing final and binding arbitration as a dispute settlement procedure for Magnuson-Moss claims would circumvent the congressionally mandated pathway to the judiciary. Also, it must be remembered that the FTC regulations promulgated under Congress’ directive carry the weight of legislative text, as if they are Congress’ words.²²⁵

2. Magnuson-Moss’ Legislative History

The legislative history of Magnuson-Moss equally, if not more so, evinces Congress’ intent to leave unfettered the consumer’s right to the judiciary. Two of Congress’ primary purposes in enacting Magnuson-Moss were to make consumer product warranties “more readily understood and enforceable” and to provide the FTC with better means of protecting consumers.²²⁶ The House Report to Magnuson Moss unequivocally states that “[a]n adverse decision in any informal dispute settlement proceeding would not be a bar to a

²²¹ 15 U.S.C § 2310(a)(3)(C).

²²² See *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (citations omitted), *remanded to* 988 F.2d 1323 (2d Cir. 1993).

²²³ 15 U.S.C. § 2310(a)(3).

²²⁴ *Miller v. French*, 530 U.S. 327, 337 (2000).

²²⁵ *Mead*, 533 U.S. at 226-27; *Chevron*, 467 U.S. at 842-44.

²²⁶ MMWA HOUSE REP., *supra* note 6, at 20, *reprinted in* 1974 U.S.C.C.A.N. at 7702.

civil action on the warranty involved in the proceeding.”²²⁷ Moreover, the Report confirmed the legislative directive requiring the admissibility of the informal mechanism’s decision in any subsequent civil action, which preserves a judicial forum after any adverse non-binding decision.²²⁸

Additionally, Senator Moss, one of the sponsors of Magnuson-Moss, furthered this view in preliminary deliberations:

[T]he bill is further refined so as to place a minimum extra burden on the courts by requiring as a prerequisite to suit that the purchaser give the supplier reasonable opportunity to settle the dispute out of court, including the use of a fair and formal dispute settlement mechanism which the bill encourages suppliers to set up under the supervision of the Federal Trade Commission.²²⁹

The legislative history of Magnuson-Moss simply confirms what its text mandates: that informal dispute settlement procedures, while permissible to use as prerequisites to suit, can never be used to eliminate the statutory right to go to court.

3. Magnuson-Moss’ Underlying Purposes

Public disclosure and consumer knowledge lie at the heart of Magnuson-Moss. The three main purposes behind Magnuson-Moss are: (1) “improve the adequacy of information available to consumers”; (2) “prevent deception”; and (3) “improve competition in the marketing of consumer products.”²³⁰ The privatization of Magnuson-Moss claims through binding arbitration bars entry into the judicial system, thereby undermining each of these codified purposes.

Furthermore, breach of warranty adjudication in federal and state court results in publicized decisions that are available in law

²²⁷ *Id.* at 41, reprinted in 1974 U.S.C.C.A.N. at 7723. The Supreme Court, when considering legislative history, prefers to “consult the documents prepared by Congress when deliberating,” namely House and Senate Reports. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 580 (1995).

²²⁸ MMWA HOUSE REP., *supra* note 6, at 41, reprinted in 1974 U.S.C.C.A.N. at 7723.

²²⁹ 119 CONG. REC. 972 (1973) (statement of Sen. Moss), *quoted in* *Parkerson v. Smith*, 2000-CA-00549-SCT, ¶ 13, 817 So. 2d 529, 533 (Miss. 2002).

²³⁰ 15 U.S.C. § 2302(a).

libraries, full depository public libraries, and the Internet legal databases. These public decisions enumerate the deceptive acts and practices of both producers and retailers of faulty products. Competitive pressures will not allow a substandard producer to remain in the marketplace.

The leading agency responsible for conducting arbitral forums is the American Arbitration Association (“AAA”).²³¹ Rules of the AAA do not require any written or reasoned decision by an arbitration panel.²³² A party does not even receive a copy of the arbitration decision unless a specific request is made.²³³ Moreover, one of the touted advantages of AAA arbitration is the *privatization* of claims.²³⁴ No public disclosure is made. This privatization is an anathema to disclosure.²³⁵

One might contend, however, that the Supreme Court has already rejected this argument.²³⁶ In *Green Tree Financial Corp. v. Randolph* the Court rejected a consumer’s attempt to circumvent the Arbitration Act with a claim under TILA.²³⁷ Coincidentally, TILA’s codified purposes are analogous to those of Magnuson-Moss.²³⁸ Nevertheless, TILA and Magnuson-Moss are fundamentally different statutes despite their common thread of consumer protection. A consumer or debtor aggrieved by a TILA violation can still use the loan, even if the terms of the loan are unlawful.²³⁹ A Magnuson-Moss

²³¹ See AM. ARB. ASS’N, A BRIEF OVERVIEW OF THE AMERICAN ARBITRATION ASSOCIATION 1, at <http://www.adr.org/index2.1.jsp?JSPssid=15765> (last visited Oct. 20, 2003).

²³² COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES R-42.b (American Arbitration Association, as amended and effective on July 1, 2003), available at <http://www.adr.org>.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Cf. Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 203 (1956) (listing the shortcomings of arbitration vis-à-vis judicial adjudication).

²³⁶ *E.g.*, Kauffman, *supra* note 112, at 382 (“Most recently, the Court upheld the arbitration for claims arising under the Truth in Lending Act, which, like Magnuson-Moss, was designed to protect consumers.”) (footnotes omitted).

²³⁷ *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 84 (2000).

²³⁸ See 15 U.S.C. § 1601(a) (describing the purposes of TILA as “a meaningful disclosure of credit terms” and consumer protection of improper billing practices).

²³⁹ *E.g.*, *In re Barber*, 266 B.R. 309, 313-14 (Bankr. E.D. Pa. 2001) (plaintiff still used loan proceeds although defendants “took advantage” of plaintiff).

plaintiff does not even get the benefit of the bargain. Rather, the buyer of defective goods does not even get full usage, if usage at all, out of the product she purchased.

Moreover, the Court in *Green Tree*, while involving an attempt to avoid arbitrating a claim under the TILA, did not address the specific issue of whether TILA overrode the Arbitration Act's mandate as the plaintiff never made such a contention.²⁴⁰ Rather, *Green Tree* addressed (1) whether a district court's order directing arbitration to proceed and dismissal of claims was a "final decision with respect to an arbitration" under Section 16 of the Arbitration Act, and (2) whether an arbitration clause that mentioned nothing about exorbitant costs would render the agreement enforceable.²⁴¹ The Court held the plaintiff had not met her burden of showing that the arbitral costs in that specific case were too excessive and that would revoke the arbitration contract.²⁴² In short *Green Tree* does not provide a sufficient basis for accepting pre-dispute binding arbitrability of Magnuson-Moss.²⁴³

VI. Conclusion

Arbitration, in some circumstances, may be a viable option for many parties. The informality can certainly prove beneficial in some circumstances. However, because of the requisite disclosure that judicial adjudication provides and arbitration conceals, consumers must be granted unwaivable access to the judiciary.²⁴⁴

Despite the liberal federal policy favoring arbitration,²⁴⁵ the Court must not simply rubber stamp every arbitration agreement. Under Magnuson-Moss there is an equally strong federal policy rebuking pre-dispute binding arbitration agreements contained in

²⁴⁰ *Green Tree*, 531 U.S. at 90.

²⁴¹ *Id.* at 82.

²⁴² *Id.* at 92.

²⁴³ Some commentators have contended that the Arbitration Act was intended initially "to settle disputes between businesses," and not consumers. See Michael D. Donovan & David A. Searles, *Preserving Judicial Recourse for Consumers: How to Combat Overreaching Arbitration Clauses*, 10 LOY. CONSUMER L. REV. 269, 270 (1998). As persuasive as this contention is, the Supreme Court has expressly rejected the argument. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 483 (1989).

²⁴⁴ NAT'L CONSUMER LAW CTR., *supra* note 18, § 5.2.2.5.1.

²⁴⁵ *McMahon*, 482 U.S. at 226.

warranties.²⁴⁶ The Court would set a dangerous precedent by siding with the Arbitration Act when this issue finally reaches the nine justices, as it would be forced to set aside federal regulations promulgated under congressional directive.²⁴⁷ This result would be wholly repugnant under *Chevron*.²⁴⁸

Allowing the consumer an “unwaivable access to the courts”²⁴⁹ would also further Magnuson-Moss’ goal of providing disclosure to the consumers.²⁵⁰ The judgments rendered in the public setting unquestionably would reach the doorstep of the average consumer, who would then be better informed of which warrantors continuously failed to fulfill their promises. The Court does not have to play “legal gymnastics”²⁵¹ to vault Magnuson-Moss over the Arbitration Act. It need only follow *Chevron*, a task it has undertaken over 150 times already.

²⁴⁶ *See supra* Part V.

²⁴⁷ *See supra* Parts III.C, V.A.

²⁴⁸ *Chevron*, 467 U.S. at 843-44.

²⁴⁹ SHELDON & CARTER, *supra* note 1, § 10.2.6.5.

²⁵⁰ *See* 15 U.S.C. § 2302(a) (2000).

²⁵¹ *Atl. Ref. Co. v. FTC*, 381 U.S. 357, 367 (1965).
