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FEATURE ARTICLE

Clash of the Federal Titans: The Federal Arbitration Act v. the Magnuson-Moss Warranty Act Will the Consumer Win or Lose?

by Katherine R. Guerin

Once upon a time, as the story goes, one party could contract with another party face to face for a sale of goods or services, and agree together on the terms for payment and delivery. Each party would pay or perform as the agreement indicated. If there was a disagreement, the parties could go to court and resolve their dispute. Regrettably, this short fairy tale is just that, a tale of long ago when it comes to consumer contracts of today.

The present day purchasing consumer is not contracting at all but is subject to a myriad of terms and conditions in confusing legal jargon. The seller’s boilerplate language becomes more like boilerplate armor, skillfully crafted by legal counsel. In contrast, the consumer has no negotiation rights and consequently, has no choice—the “take it or leave it” theory—but to sign “on the dotted line” and hope to be satisfied with the product.

If the consumer can somehow muddle through such an agreement, one of the clauses often discovered is an arbitration clause. Generally, an arbitration clause requires and binds the consumer to arbitrate any problems that may arise under the transaction. The Magnuson-Moss Warranty Act (“MMWA”), which governs consumer warranty transactions, has a provision for dispute resolutions.1 Arbitration clauses, which are governed by the Federal Arbitration Act2 (“FAA”), are different from such warranty dispute resolution mechanisms. Under the MMWA, informal dispute resolutions usually involve a panel that considers the dispute according to the guidelines set forth in the MMWA. The dispute resolution is not binding on the consumer and may not even be binding on the manufacturer.3

Alternatively, binding arbitration is usually found in the
purchase contract and is based on the parties' agreement, not imposed by law. Federal or state law will complete the arbitration agreement on procedures not clearly outlined in the agreement. An arbitral panel consisting of three arbitrators, or a single arbitrator chosen by the parties, issues a binding decision regarding the dispute that is enforceable in court.¹

The perspective from which arbitration characteristics are viewed colors its evaluation. Different considerations are important in determining whether society should encourage the use of arbitration rather than court proceedings. Of primary importance is the motivation and bargaining position of the parties. If the course of dealing is between two sophisticated parties, who wish to maintain a commercial relationship, the emphasis on the resolution of their dispute is vastly different from a consumer in dispute over a contract with a manufacturer.

This paper focuses on one of the most recent problematic areas to surface in consumer protection law; that is, whether arbitration clauses under the FAA preclude the MMWA in consumer contracts. First, this article will briefly describe the clash between the FAA and the MMWA. Second, this article will discuss the FAA, its history and provisions. Third, it will contrast the MMWA, and its history and provisions. Fourth, it will examine the arguments for, and against, arbitration in consumer contracts and their public policy. Fifth, it will discuss in depth recent court clashes of the FAA and MMWA. Finally, it will comment on the possible solutions to the conflict between the two statutes in consumer contracts.

I. THE CLASH OF THE "TITANS"

The crux of the matter is the clash between the binding provisions of an arbitration clause enforceable under the FAA and the prohibition of arbitration under the MMWA in consumer contracts. Since both of these "Federal Titans" have a valuable role to play in commercial transactions, the issue presented is which Act should override the other in cases involving consumer transactions. After serious judicial analysis, the answer appears to rest on Congressional intent and public policy.

The Federal Trade Commission Rule 703 ("FTC Rule 703") under the MMWA specifies that manufacturers and dealers cannot include binding arbitration provision in their warranties or related
documents whenever they offer a written warranty.\textsuperscript{5} The ban on binding arbitration applies to all sales of new consumer products, and some used products.\textsuperscript{6} According to one commentary, FTC Rule 703 applies to any informal dispute settlement procedure which is incorporated into the terms of a written warranty and therefore regulates not only non-binding informal dispute resolution mechanisms but also binding arbitration provision incorporated into the terms of a written warranty.\textsuperscript{7} FTC Rule 703 also states that the informal dispute settlement procedure cannot be legally binding on any person.\textsuperscript{8} Consumers have to be informed that they can pursue legal remedies if they are dissatisfied with the dispute resolution.\textsuperscript{9} One commentator concluded that "While the agency commentary accompanying the Magnuson-Moss Warranty Act regulations observes that a warrantor may offer consumers the option of binding arbitration, once a dispute has arisen, the regulations prohibit warrantors from mandating binding arbitration prior to the occurrence of the dispute."\textsuperscript{10}

Alternatively, manufacturers and dealers have attempted to enforce arbitration clauses in consumer contracts under the Federal Arbitration Act, thereby precluding any court proceedings. These clauses bind the consumer to arbitration and are without recourse in the courts.

II. ARBITRATION AND THE FEDERAL ARBITRATION ACT\textsuperscript{11}

A. Arbitration Mechanics

Before discussing the actual provisions of the FAA, an overview of the arbitration process may prove helpful. Arbitration is an alternative to litigation proceedings in court. In arbitration, the parties agree in their contract to submit any subsequent disputes arising from the transaction to an arbitrator or arbitral panel of three. The arbitration contract provision may or may not specify mechanics such as forum, rules or procedures. If the parties do agree on such terms and a dispute subsequently arises, the arbitration clause in the contract is enforceable. In cases where the parties have not made provisions for forum and rules prior to the dispute, one of several arbitration commissions can be elected for use. The commission rules most often used in the United States are the International Commerce Commission ("ICC"), American Arbitra-
The contract dispute is submitted to the arbitrator or arbitral panel with or without legal counsel for either party. The arbitrator or arbitral panel is chosen by agreement of the parties. In the case of a single arbitrator, each side must agree on the person. If an arbitral panel is used, then each side usually elects one person, with both parties agreeing to a third. The arbitrator or panel is generally not composed of judges or lawyers, but experienced business persons in the field of the commercial transactions who are also familiar with dispute resolutions.

After limited discovery, each side is allowed to present arguments before the arbitrator. After consideration of the issues, the arbitrator resolves the dispute in favor of one of the parties. The arbitration decision is usually binding, but may be appealed on causes of action at law including fraud, duress, unconscionability, unfairness of the arbitral forum or bias of the arbitrator or arbitral panel.

Further, unless a party is willing to pay for a court reporter, the arbitration forum is private and without a record of the proceedings. The arbitrator’s decision report is submitted only to the parties and is not published. The privacy gained from an arbitration decision is appealing to commercial parties who may prefer to have the decision and damages unknown to their other commercial customers.

Originally, arbitration was only recognized as an alternative dispute resolution for sophisticated commercial contract parties with solid business background, where an inexpensive, speedy resolution was more important than formalities. Often, goods were sitting on a dock awaiting the outcome of the arbitration proceedings. Additionally, the parties might have ongoing commercial transactions with one another and a bitter legal suit would harm further commercial dealings. However, over the years arbitration has become more and more frequent and acceptable.

B. The Federal Arbitration Act

Congress enacted the FAA in 1925 in an effort to dispel judiciary hostility towards arbitration based on the view that it was a displacement of the judiciary function. The FAA gave arbitra-
tion clauses an equal footing with other contract clauses. The law provides that a written provision in a commercial contract for the settlement of disputes by arbitration is valid, irrevocable, and enforceable, except for revocation based in law or equity. The FAA directed Courts to either stay litigation proceedings pending completion of arbitration or compel the parties to arbitrate.

Initially, courts resisted the FAA. In Wilko v. Swan, the U.S. Supreme Court held that the right to select a judicial forum cannot validly be waived. Furthermore, the Court opined that an agreement to arbitrate future controversies between securities brokers and buyers constituted a “stipulation” which also violated and was nullified by section 14 of the Securities Act. The Court stated in dicta that arbitration proceedings were not suited to cases requiring subjective findings on the purpose and knowledge of an alleged violator.

However, in the 1980's the Supreme Court took a strong pro-arbitration approach starting with Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth. In Mitsubishi, the Court validated an agreement to arbitrate antitrust claims when the agreement arose from international transactions. In 1989, after several other pro-arbitration cases, the Supreme Court overruled Wilko on similar facts in Rodriguez De Quijas v. Shearson/American Express, Inc. In Shearson, the Court opined that the Wilko Court’s characterization of the arbitration process was pervaded by what Judge Jerome Frank called “the old judicial hostility to arbitration” and noted that such views had been steadily eroding over the years. Further, the Court determined that once the outmoded presumption of disfavoring arbitration proceedings is set aside, it becomes clear that the right to select the judicial forum is a not essential feature of the Securities Act. The Court held that the strong language of the Arbitration Act declared that arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”

Furthermore, the Supreme Court has made it clear that the FAA applies even if the plaintiff wants to litigate in state court. In determining whether to stay proceedings or compel arbitration, the court must first decide: (1) whether the parties agreed to arbitrate,
and (2) whether the scope of that agreement encompasses the asserted claims. Accordingly, the courts must construe the intentions of the parties generously as to the issues of arbitration. This provision further preempts inconsistent state laws as the state courts are required to follow the FAA. State statutory attempts that are inconsistent with the FAA are preempted, as long as the activity involves interstate commerce.

Challenges to the validity of the contract as a whole are issues for the factfinder-arbitrator. Challenges to the arbitration clause itself on the grounds of fraud, mistake, duress, or unconscionability are left for the courts to decide. The FAA has removed the court’s ability to analyze the merits of the case when there is an arbitration clause.

The FAA’s mandatory enforcement of arbitration clauses is based on the “freedom of the contract” theory; if consenting parties not under coercion or duress agree to terms in a contract, the parties are forced to abide by the acknowledged terms. Considering that the arbitration clause was part of the bargain, the court generally deems such a unilateral request of avoidance of a term as inappropriate.

Courts now favor arbitration agreements as a matter of public policy and some have extended the national pro-arbitration policy to include consumer contracts. However, courts favor arbitration in consumer contracts only when there is a clear factual record without the issues concerning the validity, revocability and enforceability of the contract as a whole. Perhaps the courts’ more lenient attitude towards arbitration may be the result of the pressure they face from clogged court schedules and backed-up dockets.

III. THE MAGNUSON-MOSS WARRANTY ACT

Enacted in 1974, Congress designed the Magnuson-Moss Warranty Act ("MMWA") to prevent deception by promoting consumer understanding, and insuring basic protection for consumers purchasing consumer products with written warranties. Consumers had been inundated with complex problems concerning UCC warranties; complex language that rendered warranty terms incomprehensible, warranties that appeared to give more protection than they actually did (by provided express warranties combined
with disclaimers of all implied warranties and severe limitations of remedies), and lack of meaningful access to the courts. The MMWA also intended to make it easier for consumers to obtain court enforcement of a warranty by providing legal fees to prevailing consumer plaintiffs. Additionally, Congress hoped to stimulate manufacturers' production of more reliable products by requiring clear disclosure of product warranties. Although the legislative history on the MMWA is scant, the Federal Trade Commission Rules does contain a section entitled "Interpretations of the Magnuson-Moss Warranty Act," which covers basic issues of the MMWA.

The MMWA applies only to "consumer products" manufactured after July 4, 1975 and is focused on consumer warranties. The MMWA was intended to add special legal safeguards applicable to consumer warranties that are not necessary for commercial business transactions, hence the limited scope to consumers. The MMWA does not require warranties to be given, nor does it prescribe the duration of a warranty. It takes a "free market approach," and relies on the forces of competition, nourished by improved information to consumers, spurring sellers to enhance warranty terms. It provides only that if a manufacturer chooses to give a written warranty, then disclosures and provisions must be met. The warranty must be written in simple and readily understood language, must be labeled as "full" or "limited," and must be available prior to the sale. The MMWA does not apply to services, unless the services are combined with products, such as "parts and labor."

Although the MMWA does not do much in the area of substantive regulation of warranties, it has proved to be very valuable to consumers. A written warranty as defined by the MMWA is both narrower and broader than the UCC express warranty. The specific jurisdictional requirements of the MMWA must be complied with before a consumer with a warranty problem can invoke its provisions. The jurisdictional requirements are: (1) written warranties, (2) on consumer products, (3) which actually cost the consumer more than a specified amount, and (4) warranted consumer product must be distributed in commerce.

A. Written Warranties

The term "written warranty" is defined narrowly by
MMWA. A written warranty means either; (1) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time or (2) any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking, which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.54

In either case, the affirmation to refund, repair or take other remedial action, as well as the promise of defect free goods must be part of the basis of the bargain between the supplier and retail buyer of the warranted product.55

The MMWA does not cover any oral warranties.56 Oral warranties are considered under the Uniform Commercial Code.57 However, the MMWA does cover some express warranties, if they are written and meet the statutory definition.58 The question of third party responsibility for warranties, such as a retailer distributing a manufacturer’s product that contains a warranty is not covered by the MMWA, unless the retailer “adopted” the warranty.59

B. Consumer Products

MMWA defines the term “consumer product” to mean 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).60 The focus of the definition is an objective approach relying on “normal use” or common use that is not atypical, and does not have to be exclusively used as a consumer product.61 If there is a question as to the use being a normal, common consumer use and commercial use, the doubts are resolved in favor of classifying the product as a consumer product.62 Furthermore, the MMWA applies to both new and used consumer products.63

Likewise, under the MMWA a consumer means a buyer
(other than for purposes of resale) of any consumer product, any person to whom such product is transferred during the duration of an implied or written warranty (or service contract) applicable to the product, and any other person who is entitled by the terms of such warranty (or service contract) or under applicable state law to enforce against the warrantor (or service contractor) the obligations of the warranty (or service contract). By definition, the MMWA eliminates the restrictions of vertical and horizontal privity in most instances.

C. Minimum Price Requirement

Depending on the price of the product, the MMWA grants either a "full" or "limited" warranty. If the provision requiring designation of written warranties is "full," then it must meet the Federal minimum standards for warranty set forth in section 10467 of the MMWA. Accordingly, it must be conspicuously designated a "full (statement of duration) warranty" by the guarantor. If the provision is "limited," that is, if it does not meet the Federal minimum standards for warranty set forth in section 104 of the MMWA, then the guarantor must conspicuously state "limited warranty." A limited warranty only applies to warranties on consumer products actually costing the consumer more than $10 (excluding tax) and which are not otherwise designated "full (statement of duration) warranties." A consumer product may be sold with both full and limited warranties, but only if they are clearly and conspicuously differentiated. If a warrantor fails to designate full or limited, the presumption is for full warranty coverage. If a full warranty is offered, under the MMWA, the warrantor may not disclaim or modify the implied warranties arising under state law. In addition, those warrantors offering limited warranties may not disclaim implied warranties during the term of the limited warranty.

D. Distributed Within Commerce

Under the MMWA, the term "distributed within commerce" means sold in commerce, introduced or delivered for introduction into commerce, or held for sale or distribution after introduction into commerce. "Commerce" is defined as trade, traffic, com-
merce, or transportation that is (A) between a place in a State and any place outside thereof, or, (B) that affects trade, traffic, commerce, or transportation described in subparagraph (A).\textsuperscript{76} Since the MMWA covers only those products that are part of interstate commerce under the Commerce Clause,\textsuperscript{77} theoretically, it does not cover products manufactured and distributed solely within a single state.\textsuperscript{78}

E. Liabilities and Damages

Consumer remedies are allowed based on the violation by a supplier\textsuperscript{79}, warrantor\textsuperscript{80} or service contractor.\textsuperscript{81} The MMWA defines a "supplier" as any person engaged in the business of making a consumer product directly or indirectly available to consumers.\textsuperscript{82} A "warrantor" is any supplier or other person who gives or offers to give a written warranty or who is or may be obligated under an implied warranty.\textsuperscript{83} Further, the MMWA's definition for "service contract" is a contract in writing to perform, over a fixed period of time or for a specified duration, services relating to the maintenance or repair (or both) of a consumer product.\textsuperscript{84} The MMWA extends consumer damage liability for failure of a service contractor to comply with any obligations found therein.\textsuperscript{85}

Essentially the MMWA covers all entities in the chain of production and distribution of a consumer product, including the manufacturer, component supplier, distributor, wholesaler and retailer.\textsuperscript{86} A dealer who merely distributes the manufacturer's written warranty is not liable for breaches of that warranty, but the dealer may be liable under the manufacturer's written warranty if the dealer "adopts" it as its own.\textsuperscript{87}

The MMWA authorizes private damage actions not only when the MMWA is violated but also when a written warranty, implied warranty, or service contract is breached by failure to comply with the written warranty, service contract or implied warranty under state law or any requirement of the MMWA.\textsuperscript{88} The MMWA does not require that the consumer prove substantial impairment of value of the warranted product.\textsuperscript{89}

A full warranty cannot exclude or limit consequential damages for breach of any written or implied warranty on a product, unless such exclusion or limitation conspicuously appears on the face of the warranty, and if the product (or component part thereof)
contains a defect or malfunction after a reasonable number of attempts by the warrantor to remedy the defects or malfunctions. Nor can a supplier disclaim or modify an implied warranty to the consumer if there is a written warranty or a service contract entered into within 90 days of the sale of the product. Also, when there is a written warranty, any disclaimer of the implied warranty is ineffective, but the warrantor can limit the duration of the implied warranty to the same period as the written warranty.

F. Informal Dispute Resolution Under the MMWA

The MMWA addresses the issues of dispute resolution stating that Congress declared its policy to encourage warrantors to establish procedure whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms. The FTC can proscribe any minimum requirements for the informal dispute settlement procedure under the MMWA.

The minimum requirements and procedure for informal dispute settlements is set forth by the FTC and encompasses all aspects of a dispute, including the duties of a warrantor, who can qualify to be a member of the dispute resolution, how the dispute resolution will be expedited, how records will be kept, audits and confidentiality. Failure on the part of the warrantor to comply with the informal dispute settlement procedures, will result in the FTC taking appropriate remedial action. The MMWA requires the informal dispute information be given within the warranty itself. Consumers may not be charged a fee for the use of the informal dispute resolution mechanism and the mechanism must have written operating procedures. Since the results of the informal dispute settlement are non-binding on the consumer, the MMWA would obviously not favor arbitration clauses that are binding on the consumer.

IV. FACTORS FAVORING ARBITRATION CLAUSES IN CONSUMER CONTRACTS

At the outset, a consumer may find an arbitration clause in their contract attractive. The speed, lower costs, informality, autonomy and choice of a suitable neutral decision-maker as well as
privacy, all play a role in evaluating arbitration as a dispute resolution mechanism. However, these advantages are only potential advantages and are realized only when both parties cooperate in the arbitration process. Several of the attractive features of arbitration follow.

A. Speed of the Arbitration Process

The arbitration proceeding is conducted quickly; there is no loss of time waiting for normal litigation procedures including the complaint and response times mandated procedurally, discovery process time and the long wait for a court docket hearing date. Resolution of a dispute may be quickly obtained as soon as an arbitrator or panel is composed and a brief hearing process has taken place.

B. Lower Costs of Arbitration

Arbitration appears to be less costly, because the parties do not need legal counsel, nor are there court costs or filing fees. Expensive expert witnesses and large legal fees are avoided. If the parties elect to have legal representation, the legal fees are less than for a full-blown court trial. The arbitration process is shorter, therefore the fees for the arbitrator or panel are less than the fees would be for a lengthy court hearing.

C. Informality of the Dispute Process

Arbitration is also informal, the parties choose an independent third party to hear the issues and decide who will win. The informality of the process lends itself supports the benefits of less cost and speed. Discovery issues are limited and motions are less frequently a part of an arbitration proceeding. The rules of evidence and civil or criminal procedure are not used. Since most arbitration decisions have limited review, the time consuming appeals process is eliminated for the most part.

D. Choice of a Decision-maker

The parties' ability to decide the qualities of a decision-
maker is valuable for a variety of reasons. A law judge may not have the background of commercial transactions. A specialized decision-maker in the field of the commercial transactions may be in a better position to understand the crux of the dispute. Often, all that may be needed is an experienced businessperson from the same industry with familiarity of industry practices. The parties may want a person who is just fair-minded and not really familiar with the subject of the dispute. The process is self-correcting; if an arbitrator is considered unfair, or insensitive, others will not use that particular person for subsequent disputes. However, critics have maintained that because an arbitrator has to make acceptable decisions to remain an arbitrator, the arbitrator’s decisions are compromised.

E. Privacy

A court proceeding is far from private, the decision is announced to the public, may or may not be reported in the media and can be published in law reporters. In contrast, an arbitration proceeding is conducted privately, and the opinion of the arbitrator may or may not be released to others depending on the agreements of the parties. Privacy is attractive, especially if damaging information would become public knowledge and have an effect on future sales or negotiations.

V. FACTORS DISFAVORING ARBITRATION CLAUSES IN CONSUMER CONTRACTS

Despite the surface appeal of arbitration as discussed in the section above, in the consumer transaction context, there can be significant disadvantages. Consumers argue that arbitration clauses are unfair, overreaching and a deceptive practice. Some of the specific arguments follow.

A. Consumer Perception

People assume that they will have their “day in court.” An arbitration clause materially changes the dispute resolution “rules” that consumers and borrowers are accustomed to and expect. These resolutions include jury trials, class actions, or statutory
remedies. From the consumer’s point of view it is unreasonable for a manufacturer or dealer to constrain the consumer’s remedy without negotiation or notice.

B. Consumer Contracts are Contracts of Adhesion

Arbitration is not a fair substitution for litigation because the consumer may not be aware they gave up their rights under a contract of adhesion. A contract of adhesion has been defined by the courts as standardized forms prepared by one party which are offered for rejection or acceptance without opportunity for bargaining and under the circumstances that the second party cannot obtain the desired product or service except by acquiescing in the form agreement. Most binding arbitration clauses in consumer contracts are part of adhesion contracts, unlike a bargained-for commercial contracts, where the arbitration clause may be negotiated and understood by both sides.

At least one court has held that standardized contracts of adhesion may be denied use of an arbitration clause if the party in an inferior bargaining position had no meaningful choice in the purchase. Generally, the consumer cannot negotiate beyond the consumer’s freedom to buy the product at the price he wants. The pre-printed clauses are universally applied, there is no personal negotiation for the clause and most often, the consumer rarely reads it. Considering that the consumer did not write the contract nor its provisions, the consumer has unequal bargaining power.

C. Waiver of Right to Jury Trial

A binding arbitration agreement that was not knowingly and voluntarily accepted by the consumer, arguably violates the consumers 7th Amendment right to a jury trial for claims brought under common law in federal courts. The waiver of the right to a jury trial by an arbitration clause also implicates some 14th Amendment Due Process problems.

D. Notice and Opportunity to be Heard

As one commentator opined, “It is simply wrong to rest waiver of a constitutional right on the assumption that a consumer
would ... read in detail all of the documents enclosed with a new computer...

Arbitration clauses are obscured in fine print, buried within the sale contract and employ dense, contradictory language with inconsistent terms. Even if the consumer were to read the fine print, the question follows, would the average consumer understand the provisions? Consumer advocates answer definitively no. Unsophisticated consumers do not have the training of attorneys. Admittedly, most lawyers cannot even understand the legalese doublespeak that enshrounds consumer contracts. In sum, there is no notice to the consumer of the clause. If the consumer has no notice of the provisions of the contract, the consumer cannot be held to have made an “informed decision,” or at the very least, to have evaluated the arbitration clause.

Some warrantors try to avoid the notice issue with consumers by using a vendor as a “strawman.” A typical “strawman” scenario is when a consumer purchases a product and the manufacturer includes the warranty in the packaging without any notice to the consumer, and subsequently the vendor has the duty to inform the consumer of the warranty at the cashier counter. Again, this tactic severely impairs consumer notice.

In Hill v. Gateway, the Seventh Circuit recently considered the issue of notice and arbitration clauses. In Gateway, the court held that warranty terms sent in a computer packaging box, which stated that the terms governed the sale between the consumer-buyer and manufacturer unless the computer was returned within 30 days, were binding on the consumer-buyer.

The consumer-buyer in Gateway, who had kept the computer more than 30 days, filed suit in federal district court against Gateway arguing inter alia, RICO charges and lack of notice of being bound to arbitrate. Gateway immediately appealed under the Federal Arbitration Act. In compelling the consumer/buyer to submit to arbitration, Judge Easterbrook found that following the Federal Arbitration Act, an agreement to arbitrate must be enforced “save upon such grounds as exist at law or in equity for the revocation of any contract.”

Furthermore, the Seventh Circuit found Carr v. CIGNA Securities and ProCD, Inc. v. Zeidenberg instructive in binding the Hills to the arguably unassented to arbitration clause. The Gateway court also followed the reasoning of ProCD, Inc. v. Zeidenberg,
which held that in software sales, the terms inside the software box bind the consumer who uses the software after the opportunity to read the terms and to reject the by returning the product.\textsuperscript{115}

After determining that the consumer was bound to arbitration, the Gateway court discussed three ways the consumer-buyer could have protected themselves.\textsuperscript{116} First, the consumer can ask the vendor to send a copy of the warranty and services before they decide to buy.\textsuperscript{117} The Magnuson-Moss Warranty Act requires firms to distribute their warranty terms on request.\textsuperscript{118} Second, buyers can consult public sources such as computer magazines or the Web sites of vendors that may contain this information.\textsuperscript{119} Third, the buyer may inspect the documents after the product’s delivery.\textsuperscript{120} The Gateway court found that since the consumer/buyer chose the third option and had kept the computer more than 30 days, they had accepted Gateway’s offer that included the arbitration clause.\textsuperscript{121}

What kind of real notice were the consumers in Gateway given? And, why should the manufacturer be allowed to shift the burden of notice to the buyer to search for the existence of an arbitration clause; or after the sale, expect the consumer to return the item to avoid either the clause or the arbitration costs, as Gateway now dictates.\textsuperscript{122} An apt illustration of Gateway’s shortcomings in light of consumer realities is the Holiday shopping season. Imagine this burden at Christmas for the consumer-parent, as to toy warranties, when all the packages are opened and destroyed, and the “little consumer child” does not want the toy returned? Did the consumer parent have the opportunity during the shopping season to “discover” all the manufacturers’ warranties while chasing down crowded aisles trying to find this year’s latest “Tickle Me, Elmo”?\textsuperscript{123}

E. Arbitration Costs

Advocates of arbitration argue that the costs incurred are far less than litigation. Pro-consumer advocates respond that arbitration costs have skyrocketed in the past few years and that often they are as expensive as a full court proceeding.\textsuperscript{124} Courts are subsidized and arbitration forums are not. Arbitration proceedings are charged by the day, and arbitrators receive hourly wages.\textsuperscript{125} The arbitral forum may require advance payments to cover costs that may or may not be recouped.\textsuperscript{126} Arbitration proceedings can be terminated for failure to pay fees and charged in full.\textsuperscript{127} Attorney
fees are only recoverable if it is stated in the contract, unlike statutory remedy provisions that allow for attorney fees. When attorney fees are not recoverable, it is a deterrent to the consumer and discourages arbitration.

F. Arbitrators are not Judges

Another criticism of arbitration is that by its nature, arbitrators and the selection of arbitrators grants the warrantor an advantage. The warrantor most often selects the arbitrator. Generally, the arbitrator is not a judge, must less an attorney, but often is a businessperson skilled in the field or business of the warrantor-manufacturer. At the very least this poses the question of bias on the part of the arbitrator for the business entity. Fairness, which is supposed to be at the center of the dispute resolution, then becomes a concern. Further, the arbitrator may not be neutral because the warrantor, who may be a repeat customer, chooses the arbitrator. The arbitrator in pursuit of repeat business could be biased for the warrantor.

G. Procedural Problems and Inequities

Discovery in arbitration is limited. The American Arbitration Association rules provide for no discovery beyond the exchange of exhibits two business days before the hearing. Consumers who need to show a pattern of conduct for their claim will be particularly damaged. Lack of information and knowledge from limited discovery may hurt the average consumer’s claims.

In addition, limited discovery inhibits the consumer’s ability to assert other claims under statutory provisions such as the Truth in Lending Act, the Equal Credit Opportunity Act and the Fair Credit Billing Act, particularly when the consumer wants to show a pattern of conduct to bolster fraud and Consumer Protection Act claims. Each of these consumer action rights is based on documents that may or may not be in the hands of the manufacturer-warrantor, such as disclosure statements, notes, and security instruments. Often, the actions will require a supeona duces tecum, with which the consumer cannot comply because they do not have access to the needed documents. In a formal discovery process, the consumer is able to obtain documents and evidence from the op-
posing party. In effect, the limited discovery could hurt the consumers other statutory rights through the consumer’s inability to adequately prepare.

Likewise, the arbitration clause may include a choice of forum and choice of law statement. These may bind the consumer to arbitrating in an expensive distant state under laws governing that jurisdiction. The consumer has waived his procedural rights to litigate in his own state with his own laws. The practical result of a choice of law clause is that the expense of arbitrating in a distant state may be a deterrent for the consumer to arbitrate at all.

Finally, the appealability of an arbitral result is limited. The appellant must show fraud, corruption, or “evident partiality” in the proceeding or a “manifest disregard” for the law.

H. Waiver of Economic Alternatives

Under an arbitration clause, the consumer unknowingly has waived his rights to other forms of recovery. In addition to the statutory alternatives that may be options for the consumer, the consumer has lost his right to a class action against the warranty. The consumer also would not be able to recover any punitive damages, if they applied.

I. Privacy

Arbitration advocates hold up privacy as an important attribute of arbitration. Arbitration proceedings are not reported, unless one party pays for a court reporter. The arbitral decisions are not public knowledge and usually are given only to the parties. For the consumer, privacy, which is in other terms “lack of public access,” in a dispute resolution proceeding is the death knell of consumer protection. If proceedings are closed without public knowledge or attendance, information vital to other consumers is unavailable. Court proceedings are open and for the most part, are available to the public and media to disseminate information. In fact, one of the reasons punitive damages are allowed in specific contexts, is to deter undesirable conduct. If other consumers are not made aware of a problem due to the secrecy of a closed proceeding, then the warrantor/manufacturer has no reason or deterrent to change the problem.
J. Lack of Mutuality

Arguments have been made against arbitration clauses in consumer contracts based on lack of mutuality both in the obligation of the parties and for the remedy of the parties. Lack of mutuality in the obligations of the parties refers to the lack of consideration given in exchange for the consumer's waiver of rights. Lack of mutuality in the remedy of the parties refers to the case where the consumer will be compelled by the contract to arbitrate while the manufacturer will have the election of arbitration, a judicial forum or a mixed proceeding of both arbitration and litigation depending on different provisions in the contract.

Courts have found both of these lack of mutuality arguments compelling, especially lack of mutuality in the remedy where the remedy options are clearly unequal and unfairly distributed. One court found that under Restatement (Second) of Contracts Section 79 if there was adequate consideration given, then mutuality of obligation was not an additional element. Another court found that arbitration agreements do not need mutuality of remedy because contracts do not require mutuality of remedy. There is no majority in the circuits and some courts have held that both lack of mutuality and remedy will void the arbitration clause, while others have held that one or the other present will void the clause.

VI. CASE LAW CONSIDERING THE VALIDITY OF ARBITRATION CLAUSES IN CONSUMER CLAUSES

In general, several methods have been employed by consumers to challenge arbitration in consumer contracts in the courts. Methods include: (1) the arbitration clause does not apply; (2) the Federal Arbitration Act does not apply; and (3) the clause is invalid because it is unconscionable, fraud in factum, lack of mutuality or against public policy. The burden of proof rests on the party seeking to compel arbitration. That party must show knowing, intelligent and voluntary waiver by the other party.

A. The Arbitration Clause Does Not Apply

The arguments used are those typical of the public policy arguments previously discussed.
B. The Federal Arbitration Act Does Not Apply.\textsuperscript{139}

To apply the FAA to consumer contracts would contravene public policy, as the FAA applies to merchants with equal bargaining powers. With consumers, there is a marked imbalance of sophistication, knowledge and financial resources; therefore, consumers should not be compelled to arbitrate. Additionally, critics argue that if the consumer is compelled to arbitrate, he has unknowingly lost alternate forms of remedy.\textsuperscript{140}

C. Contract Theories

First, an arbitration clause may be deemed invalid because it is unconscionable. The arbitration clause is unconscionable if its terms unreasonably favor one party or on a procedural basis.\textsuperscript{141} In cases where the clause is unreasonably favorable to one party, the courts have found that one-sided unconscionable arbitration clauses should not be enforced. The courts use both absence of meaningful choice on the part of one party with unreasonably favorable contract terms for the other party.\textsuperscript{142} Courts define unconscionable as “an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.”\textsuperscript{143}

Courts are especially vigilant if the contract appears to be a contract of adhesion.\textsuperscript{144} Boilerplate language will trigger closer examination of the contract and its parties. Courts abandon the general rule of non-interference with contract agreements and subject contracts of adhesion to higher scrutiny because the contracts are considered both unfair and one-sided with little choice. The standard used for testing the contract is “absence of meaningful bargains.”\textsuperscript{145}

Courts have used the following factors to determine if an arbitration clause is procedurally unconscionable:\textsuperscript{146} (1) gross disparity of sophistication of the parties and business understanding; (2) absence of reasonable opportunity to understand the terms of the clauses; (3) absence of meaningful negotiation; (4) existence of boilerplate language drafted by party in stronger bargaining position; (5) contract terms not explained to party, nor even pointed out to party; (6) consumer had feeling of helplessness, no meaningful choice, take it or leave it contract basis; or (7) stronger party may
have used deceptive practices to obscure terms of the contract.

Second, an arbitration clause may be found to be "fraud in
factum." Under contract theory, any contract procured by fraud is
void when there is a misrepresentation of its essential or material
terms. A manifestation of assent by the party is ineffective be-
because the party believes he or she is agreeing to something else.
Likewise, a material misrepresentation is defined as a fact that
constitutes substantially the consideration of the contract, or with-
out which it would not have been made. Examples of fraud in
factum are: (1) a person unable to read who thinks they are signing
something else; (2) a person is told they have alternate forms of
recovery under the contract, which they do not, or they are not
informed at all; and (3) an unsophisticated party is told one thing,
but there is something different in the actual written language.

Third, the lack of mutuality may present an opportunity to
defeat an arbitration clause. Most of the arguments center on the
two forms of lack of mutuality discussed above under factors
disfavoring arbitration.

Finally, a claim for fraudulent inducement by material mis-
representation may defeat an arbitration clause. This argument
focuses on the policy that the stronger party bears the burden and
obligation to point out unusual terms to the unsophisticated party.
The failure to disclose the unusual terms is a material misrepresen-
tation that voids the contract.

VII. CASES HOLDING THAT THE MMWA PRECLUDES
THE FAA

The issue of binding arbitration clauses in consumer war-
 ranty cases is highlighted by several recent Alabama cases. The
Alabama courts, including the federal district courts seated in
Alabama, have struggled with the preclusion issue for several
years. The courts have a history of considering the public policy of
the Constitution of Alabama in light of the Alabama legislature's
power to enact provisions that affect and regulate arbitration.
Alabama first enacted laws concerning arbitration in 1857 and then
again in 1923. However these statutes did not abrogate common
law procedures for dealing with arbitration agreements. The
1857 statute set up a procedure to allow a post-dispute arbitration
award to have the effect of a judgment, regardless of whether the
parties consented.\textsuperscript{155} Alabama has been pro-arbitration clause enforcement to the extent that the courts have relied on common law that considers both pre- and post-dispute arbitration agreements valid.\textsuperscript{156} However, Alabama also enforces the common law that says the power to revoke an agreement to arbitrate always remains with the parties.\textsuperscript{157}

Under the Supremacy Clause of the U.S. Constitution,\textsuperscript{158} the Federal Arbitration Act preempts Alabama statutory law and renders specifically enforceable a pre-dispute arbitration agreement contained in a contract that involves interstate commerce as opposed to common law, Alabama statutory law and public policy.\textsuperscript{159} Justice O'Connor commented on the application of the FAA to state courts, when she said "I continue to believe that Congress never intended the Federal Arbitration Act to apply in state courts, and that this Court has strayed far afield in giving the Act so broad a compass." \textsuperscript{160}

The U.S. Supreme Court has not spoken on the effect the MMWA preclusion of arbitration has had on the FAA's enforcement of arbitration clauses.\textsuperscript{161} Additionally, states other than Alabama have not addressed the issue as thoroughly. However, in light of the present conflict in the Alabama decisions, other states may look to Alabama's analysis of the issue for background and guidance. Further, states may draw their own conclusions based on their respective state constitutions, legislative authority and state public policy.

In 1997, the court in \textit{Wilson v. Waverlee Homes, Inc.} found that the MMWA superceded the FAA and denied a motion to compel arbitration.\textsuperscript{162} In \textit{Waverlee Homes}, the purchasers of a mobile home brought an action in Alabama State court for breach of implied and express warranty claims and violation of the MMWA against a nonsignatory to the installment contract, but manufacturer of the mobile homes, Waverlee Homes, Inc.\textsuperscript{163} Waverlee Homes, Inc. moved the action to Federal District Court based on the federal courts' concurrent original jurisdiction under MMWA.\textsuperscript{164} Waverlee sought to compel arbitration under the FAA and to stay the judicial proceeding pending the court's ruling on the arbitration issue.\textsuperscript{165}

The issue in \textit{Waverlee Homes} was whether a warrantor who is a nonsignatory to a commercial installment sales and financing contract containing an arbitration clause may use contract principles, such as equitable estoppel, to apply the FAA and compel
buyers complaining of breach of warranty to arbitrate their claims. The court acknowledged that an arbitration clause under the FAA was a matter of consent, not coercion, and that the parties are usually free to structure their contracts. However, the court first had to determine whether there was an agreement to arbitrate between the parties. Finding that the parties must manifest assent to the bargain, the court determined that "an entity that is neither a party to nor agent for nor beneficiary of the contract lacks standing to compel arbitration." "

Turning to the issue of preemption of FAA arbitration by the MMWA, the court held that the language of the MMWA and its regulations confirmed that Congress intended consumers to retain full and unfettered access to the courts for the resolution of their disputes. Acknowledging that the MMWA did provide for informal dispute settlement procedures, the court said that these procedures were non-binding and are a "prerequisite, not a bar, to relief in court." Although the court did not decide whether the MMWA precludes waiver of judicial remedy for violation of the rights of purchasers, the court found that, in the limited issue before it, the enforcement of the specific binding arbitration clause in the mobile home purchase contract would violate the MMWA.

The question that was not answered by the Waverlee Homes court is whether the direct seller of the mobile home could have enforced the binding arbitration clause in the contract against the buyer, and whether that would be a violation of the MMWA. Interestingly, the court concluded its opinion reiterating the policy against binding arbitration for consumers in warranty contracts. The court opined that if every manufacturer colluded with product retailers to insert broad and all-inclusive arbitration clauses in consumer contract, then the manufacturer and the retailer would be able to avoid the strictures and edicts of the MMWA.

The Waverlee Homes decision was followed by several other Alabama cases. In 1998, in Rhode v. E & T Investments, Inc., the U.S. District Court held that the MMWA precluded arbitration between the buyer-lessee of a manufactured home and the manufacturer on the written or express warranty claims. In Rhode, the buyer-lessee sued the manufacturer of a mobile home for inter alia, breach of contract and breach of warranty. The manufacturer removed the action to District Court and moved to compel arbitration based on a clause in the contract for the sale of the mobile home.
The Rhode court found that the arbitration agreement at issue was not an unconscionable contract of adhesion because the plaintiff failed to supply a well-supported claim to the court. The court stated that contracts of adhesion were not ipso facto invalid. However it did list reasons why an arbitration agreement could be found unconscionable for reasons such as; the clause was unjust and unreasonable under the FAA, the finding of an absence of meaningful choice by one party, the presence of contractual terms which are unreasonably favorable to one party, the finding of unequal bargaining power among the parties, and the presence of oppressive, one-sided or patently unfair terms.

In addressing whether the MMWA precluded arbitration clauses, the court said “[t]he FAA’s mandate that agreements to arbitrate statutory claims must be enforced, may be overridden by a statute evincing a contrary congressional mandate.” Citing the Waverlee Homes decision, the court concluded that under the MMWA, Congress intended to preclude binding arbitration of written or express warranty claims arising under the FAA.

In January 1999, the courts reaffirmed Waverlee Homes in Southern Energy Homes, Inc., v. Lee and In re Knepp. In Southern Energy, the Supreme Court of Alabama ruled that, under the MMWA, arbitration clauses were not enforceable against consumers. Southern Energy involved a dispute between consumers and manufacturers with the manufacturers moving for compelled arbitration. Distinguishing Waverlee Homes as between a consumer and nonsignatory to a contract from the issue before the court where the dispute was between signatories to the contract, the court extended MMWA to preclude binding arbitration between the manufacturer-warrantor and the consumer. The court based its reasoning on the public policy of prohibiting a mechanism such as arbitration from barring a consumer from their right to court action.

In In re Knepp, the Alabama Bankruptcy Court found that debtors who had filed an adversary complaint for fraud and civil conspiracy against a creditor that financed the purchase of their car were not compelled to arbitrate following a clause in the purchase contract of the vehicle. The Knepp court found that the arbitration agreement was covered by federal law and was neither valid nor enforceable. It also found that even if the arbitration clause was enforceable, that it was void under the doctrine of unconscionabil-
However, one case in 1997, *Ex parte Isbell*, both supported arbitration and precluded arbitration. *Isbell* involved a buyer who brought breach of contract, warranty negligence and fraud claims against the manufacturer of the home, as well as the seller and the seller’s agent. On a writ of mandamus, the Supreme Court of Alabama found that although arbitration provisions of a retail installment contract between buyers and sellers was not unconscionable, the nonsignatory manufacturer could not rely on the arbitration clause.

*Isbell* supports arbitration in that the court found that arbitration clauses could be enforced in consumer contracts when the contract is not a contract of adhesion. The plaintiff had claimed that the provision in the contract, which allowed the seller-assignee to seek judicial relief while they were forced into arbitration, was unconscionable due to lack of mutuality of remedy. The court said that in order to maintain a cause of action for unconscionability, evidence must be presented to the court showing a foundation of a contract of adhesion. Since the plaintiffs had not fulfilled their burden of proof, the court did not address the question of unconscionability.

The *Isbell* decision, however, excluded the enforcement of arbitration clauses when the nonsignatory such as a manufacturer tries to enforce the clause against a consumer. The defendant claimed third party beneficiary and implied privity of contract. In rejecting the defendant’s claims, the *Isbell* court relied on *Waverlee Homes* using the contract principle that nonsignatories to the agreement have no enforcement rights as to the provisions of the agreement.

Chief Justice Hooper’s dissent opinion in *Isbell* provided an alternative point of view. Justice Hooper related that legal status of arbitration in Alabama was in a “state of flux.” Stating that there is nothing more fundamental than a contract dispute, the language of the arbitration clause in the contract must be upheld as it illustrates the intent of the parties. The dissent further distinguished the *Waverlee Homes* decision as only one federal district court case upholding the preclusion of arbitration. Stating that the defendant was within the relationship of the transaction, the dissent questioned why the majority chose to ignore the weight of authority from the federal circuit courts of appeals favoring arbitra-
tion enforcement by a nonsignatory in close relationships with the
signatories.²⁰³

VIII. CASES WHICH UPHELD FAA ARBITRATION OVER
THE MMWA

The District Court in Alabama carved out an exception to
MMWA preemption of arbitration under the FAA in Boyd v. Homes
of Legend, Inc.²⁰⁴ In Boyd, the court held that binding arbitration
clauses under the FAA could be enforced for non-written and
implied warranty claims and were not precluded by the MMWA.²⁰⁵

Boyd involved multiple disputes over the warranties on
mobile home sales. The purchase installment contracts contained
clauses for binding arbitration of disputes.²⁰⁶ The manufacturer
was not a signatory to the purchase contracts, only the buyers and
the retailer.²⁰⁷ The buyers sued for breach of express, non-written
and implied warranties.²⁰⁸ The manufacturer, Homes of Legend,
Inc., sought to compel arbitration.²⁰⁹ In its opinion, the court reiter-
ated that following Waverlee Homes, a nonsignatory to a purchase
contract could not compel arbitration as to the manufacturer.²¹⁰

However, the court refused to extend the Waverlee Homes
decision of the MMWA precluding arbitration under the FAA to the
dealer, who was a signatory to the contract and did not provide any
written warranty to the buyer.²¹¹ The Boyd court reasoned that
although the Supreme Court had said the FAA could be overridden
by MMWA, the burden was on the party opposing arbitration to
to show that Congress intended to make an exception to the FAA’s
mandate for claims arising under the MMWA.²¹²

The court found that Waverlee Homes did not apply because
Waverlee involved a written warranty and that the MMWA only
applies to written, not implied warranties.²¹³ Since the dealer had
not given the buyer any specific written warranties, the court found
that only those provisions of MMWA directed at implied or general
warranties applied, but not the provisions of the MMWA which
were directed to the written warranties.²¹⁴ The court concluded
that the MMWA “is exclusively in the context of written warranties,
and then solely with respect to informal mechanisms of dispute
resolution ... that Congress sought to limit recourse to binding
arbitration.”²¹⁵

The court also relied on the public policy of the MMWA to
protect consumers from unfair written warranties. The Boyd court further distinguished written from non-written warranties. The court agreed that written warranties are subject to the MMWA and would preclude binding arbitration under the FAA because they are the product of potentially unequal bargaining between consumers and powerful manufacturers. However, the court found that non-written warranties were derived from the legislative and judicial processes that should protect the consumer and were not derived from the potential unequal bargaining concerns that were the focus of the MMWA.

In 1999, the Eleventh Circuit considered the issue of compelled arbitration under the FAA in MS Dealer Service Corp. v. Franklin. The court found the Boyd court’s holding persuasive as to allowing a nonsignatory party to enforce an arbitration clause in the sales contract. Although the issue in MS Dealer did not involve a claim for breach of warranty and MMWA, in holding that the arbitration clause could be enforced, the Eleventh Circuit supported the liberal federal policy favoring arbitration agreements and intentions of the parties to generously construe issues of arbitrability, even in consumer contracts.

IV. CONCLUSION AND COMMENT

Does the MMWA go far enough to really protect consumers? While the MMWA does not do much in the area of substantive regulation of warranties, what it does has proved to be very valuable to consumers. However it may be concluded that it is not enough dispute resolution protection, especially in light of the court trend to liberally enforce arbitration clauses. This liberal enforcement seems to be growing in scope following the Isbell decision that arbitration clauses are enforceable in consumer contracts when the parties are both signatories to the contract. Most of the court arguments for arbitration are based on the “four-corners of the contract”—the traditional method of contract interpretation. The public policy of enforcing contract provisions is a time-honored tradition of refusal by the courts to “interfere” with the parties’ agreed terms and intent.

Under the traditional view, it would go against the grain of the courts to interject their own interpretation of the contract, and remove a provision. Thus, under the traditional analysis method,
the courts will not interfere and an arbitration agreement remains enforceable. This view is supported by the Federal Arbitration Act that has declared all arbitration clauses enforceable, and a continuing pro-arbitration policy in the courts.

Perhaps the problem with the traditional view is that it originated in a time when contracting was a different reality, i.e., two parties in face-to-face negotiation and bargained-for agreements. Consumer contracts in today's marketplace are hardly two parties, face-to-face and bargained-for agreements. The consumer cry is justified. No one bargained for these clauses, including the arbitration clauses. And laughably, if the consumer does not agree to the clauses, the consumer cannot bargain for their elimination, leaving a marketplace solution not to buy the product.

If the traditional view is one end of the spectrum, then elimination of all arbitration clauses in consumer contracts, following MMWA's lead in eliminating binding arbitration, is the other end. In other words, traditional contract analysis should not apply to consumer contracts, unless they are clearly "bargained-for" exchanges, based on the understanding and acknowledgement of the consumer party. If the consumer contracts are really contracts of adhesion, then arbitration clauses should not be allowed or should be voided by the courts.

Perhaps there is a middle ground position that might provide an equitable solution, that is, permit arbitration clauses in consumer contracts, but give the consumer better notice and provide some safeguards on the arbitral procedures. There appears to be some movement to this middle ground position by consumer lenders. In February 1999, the Practising Law Institute on Corporate Law published an article on arbitration clause drafting and implementation guidelines. Noting that consumers are accustomed to their remedy rights in court, the Kaplinsky article defined the following practices to aid consumer lenders in communicating arbitration clauses to the public. Changes which would create a better arbitration clause for consumers:

1. Use clear concise language, following the "plain English" test, enabling the consumer to understand they are signing an arbitration clause within the contract;
2. Compel full disclosure by staff when communicating with the consumer. Full disclosure would dispel unconscionable claims,
the major source of attack on contract arbitration clauses. The Kaplinsky article cautioned lenders that ambiguities are resolved against the drafter (lender, manufacturer), so that clarity and full disclosure were beneficial to both parties.

In short, the Kaplinsky article suggested that warrantors should be detailed enough to apprise consumers of their legal rights, disclose the material aspects of the arbitration process, use language that is clear, and be fair.225

In May 1998, the National Consumer Disputes Advisory Committee of the American Arbitration Association also recognized a need for change in the arbitration of consumer contracts when it published “A Due Process Protocol for Mediation and Arbitration of Consumer Disputes” (“AAA Protocol”).226 In its Statement of Principles, the AAA Protocol asserts that all parties are entitled to a fundamentally-fair Alternative Dispute Resolution (“ADR”) process. As embodiments of fundamental fairness, these Principles should be observed in structuring ADR Programs.227 The Statement continues, covering topics such as access to information; independent and impartial neutrals (arbitrators); relief outside arbitration in small claims courts; reasonable costs, locations, and time limits; and right to representation. 228 The AAA Protocol echoes the Practising Law Institute article in its guideline for information to be given to consumers:

1. clear and adequate notice of the arbitration provision and its consequences, including a statement of its mandatory or optional character;
2. reasonable access to information regarding the arbitration process, including basic distinctions between arbitration and court proceedings, related costs, and advice as to where they may obtain more complete information regarding arbitration procedures and arbitrator rosters;
3. notice of the option to make use of applicable small claims court procedures as an alternative to binding arbitration in appropriate cases; and
4. a clear statement of the means by which the Consumer may exercise the option (if any) to submit disputes to arbitration or to court process.229
As laudable as this attempt by the AAA is to address the problems regarding compelled arbitration in consumer contracts, it raises several important issues. Since it is not federal nor state statute but a "protocol", an uncertain portion of the consumer market will follow the AAA's lead in changing their arbitration clauses in consumer contracts. As demonstrated by the case law above, currently, the only state that is avidly pursuing the consumer contract arbitration issue is Alabama. Skeptically, one would assume that more than a protocol is needed to effect any change in industry. What may be needed is both more consumer litigation challenging the arbitration clauses as well as subsequent state legislative pressure to deter an industry from including arbitration clauses in consumer contracts.

Also, even if the AAA Protocol were somehow enforced, and industry complied with the proposed changes, would the average consumer understand that they are giving up their right to challenge any contract problem in court? The United States was founded on the Constitutional right to have a "day in court." From the time a consumer is in fourth grade civics class, they are told they have a legal right which cannot be taken away from them, and would assume especially that it would not be taken away in a contract provision of which they were unaware. Arbitration, while worthwhile in many contexts, does not fit into the public perception of the American justice system. Essentially, even if the consumer understood that they were signing an arbitration clause, would they believe that the government would allow their rights to be so easily signed away.

Additionally, the AAA Protocol may have created a catch-22 for industry. The AAA rules may be specifically referred in a consumer arbitration clause. One commentator has suggested that if the clause cites the AAA rules then an arbitration clause may be construed to be adopting the AAA Protocols, along with other AAA regulations as a contractual matter. It is a matter of speculation whether consumers can use the AAA Protocols as a benchmark to test the fairness of an arbitral clause as it applies to consumers.

Three final thoughts on the arbitration controversy. First, why not attack the clauses with the Uniform Commercial Code? As one commentator observed, if the arbitration clause was not in the original agreement, but in a subsequent agreement received after the sale of the goods, then the arbitration contract should be voided...
by the Uniform Commercial Code.\textsuperscript{232} When the contract is not between two merchants, such as a merchant and a consumer, UCC Section 2-207 provides that if a party accepts a contract but also states different or additional terms than were offered, those terms are regarded as mere "proposals for addition" and not modifications to the contract.\textsuperscript{233} In light of the recent \textit{Gateway} holding, this may no longer be a viable argument.\textsuperscript{234}

Second, an alternative resolution to the problem might be to just compel the advertising of the arbitration clause in the advertising of the product. Compelled advertising is not new to laws governing consumer protection and could be extended to cover an arbitration clause. However, as in other areas, compelled advertising has become a myriad of jargon thrown at the consumer during a 30 or 60-second commercial spot. Whether the consumer ever hears or sees it all in that short of a time is questionable. Also, it is doubtful that arbitration notices will ever be as significant on packaging as "The Surgeon General's Warning" on cigarettes.

Third, does the "middle ground" really address the issue or give the warrantor an out? Even if all the creditors, warrantors, and manufacturers provide the consumer with better notice and use procedural safeguards, what has really changed? The consumer now has the "choice" of better arbitration, not litigation, and is still faced with a contract of adhesion with improved, but not the best consumer protection.

Arbitration under the FAA versus preclusion under the MMWA is an unsettled area of law. Whether the clauses will ultimately be upheld or voided is in the hands of the courts and state legislatures and is based on public policies of fairness. However, until the issue is settled either way, consumer advocates can take some solace in the following warning given to industry at a Practising Law Institute workshop: Be aware that some jurisdictions have a history of hostility where courts will strain to exclude arbitration clauses or construe the clause narrowly, no matter how clear.\textsuperscript{235}

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3. 16 C.F.R. § 703 (1998), see § 703.2(a).


5. 16 C.F.R 703.2(a). For the definition of a written warranty see infra, note 45 and accompanying text.


7. See JONATHAN SHELDON AND CAROLYN L. CARTER, CONSUMER WARRANTY LAW 350 (1997) for a discussion on Binding arbitration provisions incorporated into the terms of a written warranty. This rule appears to apply only to written warranties, see 16 C.F.R. § 703.2(a) and § 703.1(e).

8. 16 C.F.R. 703.5(j).

9. 16 C.F.R. 703.5(g)(1) and 703(1)(e).


11. 9 U.S.C. §§ 1-16


14. Indeed, the English tradition of hostility toward arbitration, especially because it was binding, can be traced back to Lord Coke in Vynior's Case where the distinguished Lord opined, "[I]f I submit myself to an arbitriment...yet I may revoke it, for my act or my words cannot alter the judgment of the law to make that irrevocable, which is of its own nature revocable." Vynior's Case, 77 ENG. REP. 595, 599 (K.B.1609).


16. 9 U.S.C. § 3

17. Wilko v. Swan, 346 U.S. 427 (1953); Section 14 of the Securities Act can be

18. *Id.* at 435.


20. *Id.*


22. *Id.* at 480.

23. *Id.* at 481.


25. *Id.* at 485-486.


27. *Id.*


35. The Magnuson-Moss Warranty Act was published January 4, 1975, Pub. L. 93-637, Title I, § 101-111, 88 Stat. 2183 (1975), effective six months after publication date, but inapplicable to consumer products manufactured prior to such date. (codified at 15 U.S.C. §§ 2301-12 (1982)).


41. Pridgen, supra note 37, at 14.8.

42. See supra note 32 and accompanying text.

43. Pridgen, supra note 37, at 14.2.


47. See Pridgen, supra note 37, at 14.3.

48. Id. at 14.14.


51. Id.


56. See 16 C.F.R. § 700.3 for the warranties not covered and generally PRIDGEN, supra note 37, at 14.7, 14.18. See also SHELDON, supra note 7, at 67. Examples of “not written warranties” under MMWA include: oral statements, samples, models, pictorial representations, statements about the seller, statements of general product quality or value, product information, contractual descriptions, statements that a product meets federal inspection standards, and conditions of sale. Id.

57. 16 C.F.R. § 700.3.

58. See definition of written warranty supra note 54 and accompanying text. See also PRIDGEN, supra note 37, at 14.2.

59. 15 U.S.C. § 2301(6). Rights of action have also been denied under MMWA against a bank holding a consumer’s note and security agreement as assignee of the seller, as well as against an automobile lessor which merely used the form of a lease to finance the purchase of an automobile for the lessee. See infra at note 67 and accompanying text.


64. 15 U.S.C. § 2301(3).

65. PRIDGEN, supra note 37, at 14.11, 14.11 at n.56.

66. 15 U.S.C. § 2303(a)(1) and § 2304(a). See ALPERIN, supra note 44, at 366-367. The designation must include the duration of the warranty, i.e. ‘Full Two-Year Warranty.’


68. See PRIDGEN, supra note 37, at 14.28, 14.29. These provisions only apply if the warrantor chooses to offer a full warranty.


70. 15 U.S.C. § 2303(d).

72. 16 C.F.R. § 700.3. See Alperin, supra note 49, at 368.

73. Pridgen, supra note 37, at 14.3, 14.4.

74. Id. Pridgen opines that the rescue of the implied warranty from the chains of UCC approved disclaimers opens up some very important legal relief for aggrieved consumers. Id.


77. U.S. Const. art. I § 8 cl. 3.


81. 15 U.S.C. §§ 2301(8) and 2310(d)(1).


86. Id.

87. 15 U.S.C. § 2310(f). (Warrantors subject to enforcement of remedies.)


92. 15 U.S.C. §§ 2304(a)(2) and 2308(a).


95. 16 C.F.R. § 703.1-8.


97. 16 C.F.R. § 701.3(a)(6).

98. See generally PRIDGEN, supra note 37, at 14.34, 14.35 for a listing of the major provisions of Rule 703.

99. 16 C.F.R. §§ 703.2(b)(3) and 703.2(d).


101. Id. at 349. Arbitration actually comes out to be more expensive in most cases.


103. Id.

104. Id. at 1339.

105. U.S. Const. amend. VII.

106. U.S. Const. amend. XIV.

107. Sternlight, supra note 10, at 12.

108. 16 C.F.R. § 702.3(a) (duties of seller).

109. Hill v. Gateway 2000, Inc., 105 F. 3d 1147 (7th Cir. 1997). This case is commonly referred to as “Gateway” and will be short cited as such throughout the article.

110. Id.

111. Id. at 1148.


113. Id. Judge Easterbrook used the reasoning of the Supreme Court in Doctor’s Associates, Inc. v. Casarotto, 517 U.S. 681 (1996), which held that the arbitration clause need not be prominent.

114. Id. (citing Carr v. CIGNA Securities, Inc., 95 F.3d 544, 547 (7th Cir. 1996)).
115. Id. (citing ProCD, Inc. v. Zeidenberg, 86 F. 3d 1477 (7th Cir. 1996)). The court also mentioned Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991), another Supreme Court pro-arbitration case.

116. Gateway, 105 F.3d at 1150.

117. Id.

118. Id. (citing 15 U.S.C. § 2302(b)(1)(A)).

119. Id.

120. Id.

121. Id.

122. Id.

123. The author is referring to the shopping frenzy which was the result of an aggressive television promotion of the toy, “Tickle Me Elmo,” which could not be found anywhere in one particular Christmas season to the dismay of many consumers and parents.

124. Sternlight, supra note 10, at 12, discussing arbitration costs under the International Chamber of Commerce rules that demand the filing party to pay at least $2,000 for the services of the ICC and its arbitrator.

125. AAA Rules, at R-53. See also Frederick L. Miller, Arbitration Clauses in Consumer Contracts; Building Barriers to Consumer Protection, 78 Mi. Bar J. 302, 303 (1999), discussing the fees for arbitration under the American Arbitration Association starting at $500 for claims under $10,000 and up.

126. AAA Rules, R-54.

127. Id. at R-51 and R-56.

128. Id. at R-45.

129. Id. at R-23, R-33. See also Miller, supra, note 126.

130. Id. at R-45 (1999).

131. Id. at R-50(c).


133. AAA Rules at R-28.
134. Id. at R-25. See also AAA Guide.


136. Northcom, Ltd., 694 So. 2d at 1339.

137. Stewart, supra note 26, at 348-350.


145. Donovan, supra note 33, at 277.


147. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (arbitration clause is unenforceable when clause is product of fraud, coercion or compelling economic power). See also Restatement (Second) of Contracts §160 (1980).

Lufkin and Jenrett Securities Corp., 912 F. 2d 1563 (6th Cir. 1990) (agreement to arbitrate induced by fraud struck down.

149. Cancanon v. Smith Barney, Harris, Upham & Co., 805 F. 2d 998 (1986) (fraud in factum is where one party believes he is agreeing to something different as in an unsophisticated, trusting customer).

150. Hull v. Norcom, Inc., 750 F. 2d 1547 (11th Cir. 1985) (arbitration clause held invalid because granted one party unilateral right to a judicial forum); Northcom v. R.E. Jones, supra note 102, (lack of mutuality of remedy constitutes substantive unconscionability).

151. See Cancanon, 805 F.2d at 998.


153. Id. at 1002.

154. Id. at 1001.

155. Id.

156. Id.

157. Id.

158. U.S. Const. art. VI §2.

159. Southern Energy, 732 So.2d at 1002.

160. Id. at 1003 citing Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995), Justice O'Connor specially concurring. See also note 31 and accompanying text.

161. Id. at 1003.


163. Id. at 1530.

164. Id.

165. Id.

166. Id. at 1533.

167. Id.

169. *Id.* at 1537.

170. *Id.*

171. *Id.* at 1539.

172. *Id.* at 1540.

173. *Id.*


175. *Id.* at 1322.

176. *Id.* at 1324.

177. *Id.* at 1326-1327.

178. *Id.* at 1327.

179. *Id.* (citing Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987)).

180. *Id.*

181. Southern Energy Homes, Inc. v. Lee, 732 So.2d 994 (Ala. 1999). This is currently a hotly contested issue. In June 2000, the Supreme Court of Alabama overruled *Southern Energy Homes, Inc. v. Lee.* Southern Energy Homes, Inc. v. Ard, 2000 WL 7095000 (Ala. June 5, 2000). This case has not yet been released for publication. The court reversed its decision in *Southern Energy Homes v. Lee* and, on similar facts, held that there was an agreement between the parties to arbitrate. *Id.* at *3. Furthermore, the court opined that the Magnuson-Moss Warranty Act does not invalidate such arbitration provisions. *Id.* at *4.


184. *Id.* The prior case cite is *Southern Energy Homes, Inc. v. Lee*, 708 So.2d 571 (Ala. 1997).

185. *Id.* at 995.

186. *Id.* at 996.

188. Id.


190. Id.

191. Id.

192. Id. at 574.

193. Id.

194. Id. The court relied on Northcom, Ltd. v. James, 694 So.2d 1329 (Ala. 1997) which required demonstrated proof of a contract of adhesion.

195. Isbell, 708 So.2d at 574.

196. Id. at 578.

197. Id.

198. Id. at 576, 578.

199. Id. at 582. (Hooper, C.J. dissenting).

200. Id.

201. Id.

202. Id. at 584.

203. Id.


205. Id. at 1423.

206. Id. at 1427.

207. Id.

208. Id.

209. Id. at 1427.

210. Id. at 1428.

211. Id. at 1436.
212. *Id.* at 1436, 1437. See also note 179 discussing the *Shearson/American Express v. McMahon* decision.

213. *Id.* at 1437.

214. *Id.*

215. *Id.* at 1438.

216. *Id.* at 1438 n. 11.

217. *Id.* at 1440.

218. *Id.*

219. MS Dealer Service Corp., v. Franklin, 177 F.3d 942 (11th Cir. 1999).

220. *Id.* at 947.

221. *Id.*

222. PRIDGEN, *supra* note 37, at 14.4.


224. *Id.* at 513.

225. *Id.* at 516.


227. *Id.*

228. *Id.*

229. *Id.*


233. *Id.*
234. *Gateway*, 105 F.3d at 1147.