No. 00-0722

IN THE SUPREME COURT OF TEXAS

IN RE AMERICAN HOMESTAR OF LANCASTER, INC. AND NATIONWIDE HOUSING SYSTEMS, INC.

Original Proceeding
From the Thirteenth Court of Appeals
Corpus Christi, Texas

BRIEF FOR AMICUS CURIAE FEDERAL TRADE COMMISSION IN SUPPORT OF THE REAL PARTIES IN INTEREST AND IN OPPOSITION TO THE PETITION FOR A WRIT OF MANDAMUS

DEBRA A. VALENTINE
General Counsel

JOHN F. DALY
Assistant General Counsel

LESLIE RICE MELMAN
Attorney
Federal Trade Commission

JUDITH A. SHEPHERD
State Bar. No. 18221300
Attorney
Federal Trade Commission

IDENTITY OF PARTIES AND COUNSEL

Relators and Defendants Below:	American Homestar of Lancaster, Inc. 800 North Beckley Lancaster, Texas 75146 Nationwide Housing Systems, Inc. 2002 Suntide Road Corpus Christi, Texas 78409
Attorneys for Relators and Defendants:	Jay K. Rutherford Jackson Walker, L.L.P. 301 Commerce Street, Suite 2400 Fort Worth, Texas 76102 (817) 334-7200
Respondent:	Court of Appeals for the Thirteenth District 901 Leopard Street, 10th Floor Corpus Christi, Texas 78401 (361) 888-0416
Real Parties in Interest and Plaintiffs Below:	James L. Van Blarcum and Clara M. Van Blarcum 530 Riverview Robstown, Texas 78380
Attorney for Real Parties in Interest and Plaintiffs:	L. Scott Smith Wilson Plaza East 545 North Upper Broadway, Suite 114 Corpus Christi, Texas 78476 (361) 883-9963

Other Interested Persons:

Trial Judge:	Hon. Marisela Saldaña Nueces County Courthouse 901 Leopard Street Corpus Christi, Texas 78401
Defendant Below:	Associates Housing Finance Services, Inc., d/b/a Housing Finance Services and a/k/a Associates Housing Finance, L.L.C. P.O. Box 141029 Irving, Texas 75014-1029
Attorney for Defendant:	Michael P. Ridulfo Daniel Hall Sorrell, Anderson, Lehrman & Maixner, L.L.P. 711 N. Carancahua, Suite 1200 Corpus Christi, Texas 78475 (361) 884-4981

DISCLOSURE PURSUANT TO RULE 11

This brief is being tendered on behalf of the Federal Trade Commission. No fee has been paid to the Federal Trade Commission in connection with the preparation of this brief.

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STATEMENT OF INTEREST OF THE FEDERAL TRADE COMMISSION

The Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 *et seq*. ("Magnuson-Moss Act" or "the Act"), establishes comprehensive federal requirements regarding warranties on consumer products.[1] President Ford signed the Act into law on January 4, 1975, following almost eight years of congressional deliberations and study of deceptive warranty practices and inadequate warranty performance. *See generally* Barkley Clark & Christopher Smith, *The Law of Product Warranties* ¶ 14.02 (1984); Denicola, *The Magnuson-Moss Warranty Act: Making Consumer Product Warranty A Federal Case*, 44 Fordham L. Rev.

[1]The requirements of the Magnuson-Moss Act apply to "consumer products." 15 U.S.C. § 2302. For purposes of the Magnuson-Moss Act, a "consumer product" means "any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes * * *." 15 U.S.C. § 2301.

The Commission expresses no view on the separate question whether the Magnuson-Moss Act precludes warrantors from requiring consumers to submit disputes arising under *implied* warranties to binding arbitration.

STATEMENT OF THE CASE

This is a petition for mandamus seeking review of an order of the Thirteenth Court of Appeals-Corpus Christi. On April 6, 2000, the Court of Appeals conditionally granted a writ of mandamus, vacating a trial court order in which plaintiffs James and Clara Van Blarcum were directed to submit to binding arbitration disputes arising from their purchase of a mobile home that was manufactured by defendant, American Homestar of Lancaster, Inc. ("American Homestar"), and sold to the Van Blarcums by defendant, Nationwide Housing Systems, Inc. ("Nationwide"), in Corpus Christi, Texas. In the underlying action, the Van Blarcums allege that Nationwide and American Homestar have breached written and implied warranties by failing to comply with the Van Blarcums' requests to make repairs to their home. They seek damages and equitable relief pursuant to the federal Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 *et seq*., and the Texas Deceptive Trade Practices Act, Tex. Bus. & Comm. Code Ann. §§ 17.41 *et seq*.

As alleged in their complaint, on or about May 23, 1997, the Van Blarcums signed a

way to the sale, purchase, or occupancy of the [mobile home] including * * * the manufacture, design, construction, performance, delivery, condition, installation, financing, repair or servicing of the [mobile home] and the existence of any claims under any warranties * * * [would] be resolved by means of final and binding arbitration * * *." Mandamus Pet. App. B. Contemporaneously with their purchase of the mobile home, the Van Blarcums received the manufacturer's "Limited Warranty of New Manufactured Home" (Mandamus Pet. App. C), and the retailer's "Limited Warranty New Manufactured Home" and "Limited Warranty New Manufactured Home Installation". Mandamus Pet. App. D.

Following purchase and installation of the home, the Van Blarcums notified the seller (Nationwide) and the manufacturer (American Homestar) of various defects in the construction and installation of the mobile home. Mandamus Pet. App. F, at 4. Despite assurances from the retailer and the manufacturer that the deficiencies would be remedied, numerous complaints remained unsatisfied nine months after the Van Blarcums first requested that warranty repairs be made. *Id*.

On or about July 31, 1998, the Van Blarcums filed an action in County Court at Law No. 3, Nueces County, seeking, *inter alia*, injunctive relief and damages. The Van Blarcums also sought a stay of arbitration on the ground that the provision for binding arbitration was void because it violated the federal Magnuson-Moss Warranty Act. *Id. at 2.* Nationwide and American Homestar moved for an order compelling binding arbitration of the Van Blarcums' claims, arguing, *inter alia*, that under the Federal Arbitration Act

("FAA"), 9 U.S.C. § 2, the contractual provision for final and binding arbitration must be given effect. On February 2, 1999, the trial court (per Hon. Marisela Saldaña) issued an order directing the parties to proceed to binding arbitration in accordance with the terms of the "Arbitration Provision" and staying litigation of their claims pending resolution of the matter by the arbitrator. Mandamus Pet. App. E. The Van Blarcums filed a petition for a writ of mandamus with the Thirteenth Court of Appeals, seeking an order directing the trial court to vacate its order compelling binding arbitration.

On April 6, 2000, the court of appeals conditionally granted the writ, and issued an order directing the trial court to vacate its order compelling binding arbitration of the Van Blarcums' warranty claims. *In re Van Blarcum*, 19 S.W.3d 484 (Tex. App.-Corpus Christi 2000) (*en banc*). The court of appeals reasoned that the Magnuson-Moss Warranty Act prohibits warrantors from requiring the use of binding arbitration to resolve claims arising under written warranties for consumer goods. Accordingly, the court of appeals held, the agreement compelling arbitration of disputes arising from the Van Blarcums' purchase of a mobile home was "invalid and unenforceable in its entirety, both as to the Van Blarcums' written warranty and implied warranty claims." 19 S.W. 3d at 496. Although recognizing that, under the FAA, written provisions for arbitration are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract" (9 U.S.C. § 2), the court cautioned that such earlier and more general enactments

must yield to the more recent and more specific provisions of the Magnuson-Moss Act. 19 S.W. 3d at 491.[3]

On June 29, 2000, the court of appeals denied petitioners' motion for a rehearing.

ARGUMENT

I. THE MAGNUSON-MOSS WARRANTY ACT AND THE COMMISSION'S BINDING REGULATIONS PROHIBIT IMPOSITION OF BINDING ARBITRATION ON WRITTEN CONSUMER WARRANTY CLAIMS

A. The Language and Legislative History of the Act Confirm that Congress Intended to Preserve Consumers' Access to Judicial Remedies

In enacting the Magnuson-Moss Act, Congress entrusted the FTC with a key role in establishing minimum standards for nonjudicial resolution of written warranty disputes. *See* 15 U.S.C. § 2310(a)(3). While Congress discussed several of these minimum standards specifically in enacting the Magnuson-Moss Act, it left it to the FTC to define more precisely those and other appropriate minimum standards by promulgating binding

[3]Two judges filed a partial dissent. Although they agreed that the binding arbitration agreement was unenforceable as to the consumers' written warranty claims, they would have held that the compulsory arbitration provision should be enforced insofar as it applied to the consumers' implied warranty and non-warranty claims.

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any "Mechanism" — *i.e.*, any informal dispute settlement procedure, 16 C.F.R.§ 703.2(e) — "shall not be legally binding on any person." 16 C.F.R. § 703.5(j). As the Commission has repeatedly recognized (*see* pp. 10-11, *infra*), this aspect of its regulations simply carries out the will of Congress itself. Congress's careful choice of words in Section 2310(d) — referring only to "initial resort" to informal dispute procedures — plainly contemplates nonbinding arbitration or similar procedures in which the parties can air their positions and attempt to resolve the dispute, but remain free to pursue legal remedies if such efforts fail.

Petitioners' reliance on the absence of statutory language specifically rejecting binding arbitration of warranty disputes is unavailing. *See* Mandamus Pet. at 6-7. Congress's failure to mention the FAA or "formal dispute resolution procedures" provides no support for petitioners' contention that the Magnuson-Moss Act "merely pertains to a warrantor's option to provide for an informal dispute settlement mechanism * * * and does not speak to formal means of settling disputes * * *, such as binding arbitration." Mandamus Pet. at 4-5. Like the FAA, Magnuson-Moss encourages businesses to adopt means of settling disputes with the aid of independent third parties, by procedures more informal than litigation. *See* 15 U.S.C. § 2310(a)(1). ("Congress hereby declares it to be its policy to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms."). Congress did not distinguish these "informal" nonjudicial procedures from other, more formal, nonjudicial procedures. It simply described Magnuson-Moss procedures as

"informal" by contrast with litigation — a description that applies equally to FAA arbitration. *See, e.g., Forsythe Intl., S.A. v. Gibbs Oil Co.*, 915 F.2d 1017, 1022 (5th Cir. 1990) ("As a speedy and informal alternative to litigation, arbitration resolves disputes without confinement to many of the procedural and evidentiary strictures that protect the integrity of formal trials."); S. Rep. No. 93-151, 93d Cong., 1st Sess. 22-23 (1973) ("A purchaser can utilize informal dispute settlement procedures established by suppliers or * * * may resort to formal adversary proceedings with reasonable attorney's fees available if successful in the litigation * * *."). Thus, Congress's failure to mention the FAA or "formal dispute resolution procedures" provides no support for petitioners' contention that Congress intended to leave room for nonjudicial dispute resolution procedures that do not satisfy the requirements of Magnuson-Moss.

Furthermore, there is no merit to petitioners' contention that their arbitration agreement with the Van Blarcums was enforceable because it was a "separate document." Mandamus Pet. 13. A provision requiring binding arbitration of warranty disputes is a term of the warranty regardless of whether the clause appears in the warranty document itself or someplace else. To conclude that the requirements of Magnuson-Moss do not apply to a provision controlling written warranty disputes merely because it appears in a different piece of paper from the warranty impermissibly elevates form over substance. *See Wilson v. Waverlee Homes, Inc.*, 954 F. Supp. 1530, 1539 (M.D. Ala. 1997), *aff'd mem.*, 127 F.3d 40 (11th Cir. 1997).

Any arguable uncertainty about Congress's intent in this regard is dispelled by the Act's legislative history, which confirms that Congress contemplated that consumers would have continued access to judicial remedies for breach of written warranties, even after exhausting any informal dispute settlement mechanisms established by warrantors. Indeed, each of the legislative proposals that evolved ultimately into the Magnuson-Moss Warranty Act preserved consumers' judicial remedies. Senator Moss, introducing S. 986 — a precursor of the final statute — described consumers' remedial options in terms that leave no room for binding arbitration. In particular, he explained that under the proposed legislation "[i]f a supplier does not have an informal dispute settlement mechanism" or "if the consumer is not satisfied with the results obtained in any informal dispute settlement proceeding, the consumer can pursue his legal remedies *in a court of competent jurisdiction* * * *." 117 Cong. Rec. 39818 (Nov. 8, 1971). A refined version of S. 986 was introduced by Senators Magnuson and Moss in the 93rd Congress as S. 356. Under S. 356, "[a]ny purchaser who utilizes an informal dispute settlement mechanism would not be prevented from seeking formal judicial relief following such utilization." S. Rep. No. 93-151, at 23. Rather, "[a] purchaser can [either] utilize informal dispute settlement procedures established by suppliers or * * * resort to formal adversary proceedings with reasonable attorney's fees available if successful in the litigation * * *." *Id*. at 22-23. Reporting on the companion bill in the House, H.R. 7917, the Committee on Interstate and Foreign Commerce similarly declared that "[a]n adverse decision in any informal dispute settlement proceeding would not be a bar to a civil action on the warranty involved in the

proceeding * * *." H.R. Rep. No. 93-1107, 93d Cong., 2d Sess. 41, *reprinted in* 1974 U.S.C.C.A.N. 7702, 7723. Thus, in providing for informal dispute resolution in cases covered by the Magnuson-Moss Act, Congress consistently and carefully limited warrantors' ability to require resort to such procedures, and specifically preserved the right of consumers to pursue a court action notwithstanding a contractual provision for binding arbitration.

B. The Commission's Interpretation of the Statutory Requirements is Entitled to Substantial Deference; in any Event, FTC Rule 703 is a Binding, Legislative or Substantive Rule

In light of the statutory scheme and legislative history, the Commission, in adopting Rule 703, was eminently reasonable in concluding that "Congressional intent was that decisions of [15 U.S.C. § 2310 dispute settlement] [m]echanisms not be legally binding." 40 Fed. Reg. 60168, 60210 (1975) (Statement of Basis and Purpose). The Commission has consistently adhered to this position, moreover. In 1999, following a comprehensive review of its warranty rules and related guides, the Commission reaffirmed that "this interpretation continues to be correct." 64 Fed. Reg. 19700, 19708 (1999). The Commission announced that "Rule 703 will continue to prohibit warrantors from including binding arbitration clauses in their contracts with consumers that would require consumers to submit warranty disputes to binding arbitration." 64 Fed. Reg. at 19708-09.

Accordingly, even if this Court somehow were to find that Congress's intent was unclear in the statute itself, this consistent and well-reasoned interpretation by the agency -

[7]This requirement is among several mandatory requirements for any "Mechanism" – *i.e.,* an informal dispute resolution procedure that the consumer may be required to use for warranty claims covered by the Act. *See*

States, 153 F.3d 225, 228 n.1 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 1334 (1999); K. Davis & R. Pierce, *Administrative Law Treatise*

[8]Section 2 of the FAA, 9 U.S.C. § 2, provides that "[a] written provision in * * * a contract * * * to settle by arbitration a controversy thereafter arising out of such contract or transaction * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

e.g., United States v. Trident Seafoods Corp., 92 F.3d 855, 862 (9th Cir. 1996), *cert. denied,* 519 U.S. 1109 (1997).

As the Supreme Court has explained, the FAA was enacted in order "to overcome courts' refusals to enforce agreements to arbitrate." *Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 270 (1995); *see Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 474 (1989). It not only "declared a national policy favoring arbitration," but actually "withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland Corp. v. Keating,* 465 U.S. 1, 10 (1984). Thus, as the court below acknowledged, where a federal statute is silent on the issue of arbitration, the FAA allows mandatory arbitration over federal statutory causes of action. *See In re Van Blarcum,* 19 S.W.2d at 491 (discussing *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (RICO and Securities and Exchange Act), and *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20 (1991) (Age Discrimination in Employment Act)). "Like any statutory directive, the [Federal Arbitration Act's] [proarbitration] mandate may be overridden by a contrary congressional command." *In re Van Blarcum,* 19 S.W.2d at 490 (*quoting Shearson/American Express, Inc.*, 482 U.S. at 226).

The Magnuson-Moss Act, however, is not silent on the issue of arbitration. Rather, "the language of the Magnuson-Moss Act, the regulations adopted pursuant to it, and its legislative history all confirm that Congress * * * intended that * * * consumers are to retain full and unfettered access to the courts for the resolution of their disputes." *Wilson*

v. Waverlee Homes, Inc., 954 F. Supp. at 1537; *accord*, *Rhode v. E & T Investments*, Inc., 6 F. Supp.2d 1322, 1331 (M.D. Ala. 1998). Under basic principles of statutory construction, such a specific regulatory provision, promulgated pursuant to express congressional authority, controls over more general provisions, such as those of the FAA. See generally N. Singer, 1A *Sutherland Statutory Construction* § 23.19 (5th ed.); *see, e.g.*, *Fleming Foods of Texas v. Rylander*, 6 S.W.3d 278, 286 (Tex. 1999) ("General statements of the Legislature's intent cannot * * * override the clear meaning of a new, more specific statute.").

To summarize, it does no disservice to the general federal policy favoring arbitration to recognize that, in the specific circumstance of consumer product written warranty actions subject to the Magnuson-Moss Act, that general policy has been "overridden by a contrary congressional command." *Sh O3At F3 er pinno Eress*

JOHN F. DALY
Assistant General Counsel

LESLIE RICE MELMAN
Attorney
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room 582
Washington, D.C. 20580
(202) 326-2478

_____
JUDITH A. SHEPHERD
State Bar. No. 18221300
Attorney
Federal Trade Commission
1999 Bryan Street, Suite 2150
Dallas, Texas 75201
(214) 979-9383

October 2000

CERTIFICATE OF SERVICE

This is to certify tha on this 16th day of October, 2000, one copy of the foregoing Brief for Amicus Curiae Federal Trade Commission in Support of the Real Parties in Interest and in Opposition to the Petition for a Writ of Mandamus was served by overnight courier on each of the following:

L. Scott Smith, Esq.
Wilson Plaza East
545 N. Upper Broadway
Suite 114
Corpus Christi, Texas 78476

Jay K. Rutherford, Esq.
Jackson Walker, L.L.P.
301 Commerce Street
Suite 2400
Forth Worth, Texas 76102

Michael P. Ridulfo, Esq.
Sorrell, Anderson, Lehrman
& Maixner, L.L.P.
American Bank Plaza
711 N. Carancahua, Suite 1200
Corpus Christi, Texas 78475

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