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No. 12-

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

MARLBOROUGH HOLDINGS GROUP, LTD.,

Petitioner,

vs.

AZIMUT-BENETTI, SpA, PLATINUM YACHT
COLLECTION NO. TWO, INC., GEORGE JOUSMA,
MICHAEL BUSACCA AND SCOTT WARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

On January 31, 2013, the Eleventh Circuit issued its opinion affirming in full the District Court rulings granting two motions for summary judgment filed by Defendant AZIMUT-BENETTI, SpA, and by Defendants PLATINUM YACHT COLLECTION NO. TWO, INC., GEORGE JOUSMA, MICHAEL BUSACCA, and SCOTT WARD, respectively (hereinafter, “Respondents”). Petitioner, MARLBOROUGH HOLDINGS GROUP, LTD. (hereinafter, “Petitioner”) seeks review in this Court as it believes the Eleventh Circuit both misapprehended the law and overlooked legal authority that would and should have resulted in a reversal of the lower court rulings rather than affirmance. Specifically, in determining that Petitioner was not among the class of consumers covered under the provisions of the Magnuson-Moss Warranty Act, the appellate court denied Petitioner the protections of that federal law, in direct conflict with the holding of the Seventh Circuit, thereby resulting in a denial of Petitioner’s right to due process.

Two questions are presented:

1. Was Petitioner a protected consumer under the provisions of the Magnuson-Moss Warranty Act?
2. Was Petitioner’s cause of action for breach of warranty under state law a proper claim based on a correct application of federal warranty statutes to state warranty provisions?

LIST OF PARTIES

The parties below are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

Petitioner is a foreign business entity organized and existing in accordance with the laws of the British Virgin Islands with its principal place of business located in Guernsey, Channel Islands. It has no parent corporation and no publicly held corporation owns 10 percent or more of its stock.

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OPINION

The opinion of the Eleventh Circuit has not yet been reported in the official reporter, however, the opinion can be found online at *2013 U.S. App. LEXIS 2216* (11th C.C.A. No. 11-14932, opinion filed Jan. 31, 2013).

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutory provisions involved include Title 15 U.S.C. §2301 *et. seq.* (commonly known as the “Magnuson-Moss Warranty Act”) and several sections of the Code of Federal Regulations, specifically, 16 C.F.R 702.3(a) and (b), and 16 C.F.R. 701.3(a)(1).

STATEMENT OF THE CASE

In 2008, Petitioner sued several parties, including Respondents, for equitable relief and damages for a fraud-based concealment conspiracy to keep material facts regarding a 115' yacht away from consumers through various omissions and misrepresentations of the co-conspirators. Respondent AZIMUT-BENETTI, SpA was the yacht's manufacturer, and the other Respondents, PLATINUM YACHT COLLECTION NO. TWO, INC., were a yacht dealer and its former and current officers,

respectively.¹ The vessel had sustained significant grounding damage during manufacture—a fact which was later willfully concealed from both Petitioner and the first retail purchaser of the yacht (from whom Petitioner purchased it). Respondent AZIMUT-BENETTI, SpA disclosed the yacht's damage and extensive repairs to Respondent PLATINUM YACHT COLLECTION NO. TWO. Because of this extensive damage, the latter conditioned its purchase on obtaining a manufacturer's 10-year transferable hull warranty because it was concerned, given the yacht's damage history, that something might go wrong with the hull structure. Respondent AZIMUT-BENETTI, wanting to sell its product, agreed to stand behind its work and did in fact issue a 10-year transferable hull warranty that went into effect when Respondent PLATINUM YACHT COLLECTION NO. TWO took delivery on September 26, 2000. The dealer marketed the yacht as “new” and held the yacht in its “new” vessel inventory as a Florida dealer.

In April 2001, the subject yacht was initially purchased by George Hall (“Hall”), a consumer. Provisions of the Magnuson-Moss Warranty Act and the Federal Trade Commission's commercial practices required the dealer to show Hall the existing warranty, however, instead of showing Hall the 10-year warranty, the Respondent dealer wrote a 12-month warranty in the Respondent manufacturer's name and informed Hall that the manufacturer provided a 12-month hull warranty on this

1. All future references in this Petition to Respondent PLATINUM YACHT COLLECTION NO. TWO should be read as though reference was being made to both the entity and these officers, all of whom were defendants below.

yacht and attached this “made up” warranty to the Yacht Purchase Order. Hall learned that this was not true, that in fact the manufacturer actually provided five-year hull warranties for its other “new” yachts. After further negotiations between the parties, the vessel was sold to Hall with the manufacturer’s full hull warranty. Hall was never told about (1) the serious damage suffered by the yacht during construction, (2) the extensive repairs necessitated thereby, or (3) the existing transferable 10-year hull warranty. Disclosure of these material facts would likely have caused Hall not to buy the yacht, or alternatively, to offer less than the \$8.6 million he agreed to pay—and had these material facts later been disclosed to Petitioner, it, too, would not have purchased the vessel.

The day before the Hall closing, Respondent PLATINUM YACHT COLLECTION NO. TWO asked Respondent AZIMUT-BENETTI, SpA to sign a five-year hull warranty to conceal the existing 10-year warranty. This request was made so that the dealer would not have to show Hall the 10-year warranty which would no doubt have put Hall on notice that something was different about this yacht because of the length of the warranty. Respondents conspired with each other to defraud Hall, and in furtherance of that conspiracy, a five-year warranty was prepared and given to Hall.

In December, 2007, Petitioner contracted with Hall’s company to purchase the yacht for \$8.4 million. Shortly after the sale was completed, and well within the 10-year warranty period noted above, Petitioner discovered the undisclosed damage to the yacht’s structural hull. While Petitioner did not yet know there was warranty coverage for the yacht, it nevertheless submitted a warranty

claim to the manufacturer in May, 2008, which again was well within the 10-year transferable hull warranty period that started running on September 26, 2000 (the date Respondent AZIMUT-BENETTI, SpA first transferred the vessel to Respondent PLATINUM YACHT COLLECTION NO. TWO). The manufacturer denied any liability or responsibility for the needed structural hull repairs.

In July 2008, the yacht sustained damage during an attempted lift onto a cargo ship for transport to Europe. After the lifting accident, Petitioner discovered the yacht had undergone extensive repairs from a prior grounding. Additional structural hull defects and severe problems relating to the manufacturer's repairs were also discovered. Throughout much of 2008, the manufacturer continued to conceal the yacht's past grounding and failed to disclose to Petitioner other information in its possession about the extensive nature of the damage this "new" yacht suffered during construction. Eventually, during restorative work done to the yacht by Petitioner, it discovered the whole truth about the vessel; Respondent AZIMUT-BENETTI, SpA could no longer hide the damage which occurred during the vessel's construction and the subsequent failed repairs. However, Respondents continued to conceal the existence of the 10-year hull warranty until May, 2010, at which time Petitioner finally learned of its existence when it obtained a copy of the purchase contract containing the written warranty during discovery. At that time, Petitioner filed its Second Amended Complaint alleging various alternative claims against the Defendants (including all Respondents) in both their individual and co-conspirator capacities. Among the counts were violations of the Magnuson-Moss Warranty

Act (Count III) and a breach of express warranty claim under Florida law (Count IV).

On March 18, 2011, the United States District Court for the Southern District of Florida entered orders granting two separate summary judgment motions filed by Respondent AZIMUT-BENETTI, SpA and Respondent PLATINUM YACHT COLLECTION NO. TWO, respectively. In granting these motions, the District Court held that the subject 10-year warranty only benefitted the first purchaser of the vessel, *i.e.*, Respondent PLATINUM YACHT COLLECTION NO. TWO (the dealer), notwithstanding that said warranty did not contain any limiting language (as required by federal law) that would have made it inapplicable to “remote purchasers,” such as Petitioner. On March 25, 2011, the Court entered final judgments for Respondents. Petitioner timely filed its Notice of Appeal on April 14, 2011. In the appeal to the Eleventh Circuit, Petitioner sought *de novo* review of the district court’s interpretation of the 10-year transferable hull warranty which obligated Respondent manufacturer to repair or replace defects in the hull structure. On January 31, 2013, the Eleventh Circuit affirmed in all respects the decision of the lower court. Of particular significance to this Petition was the appellate court’s determination that Petitioner did not meet the definition of a “consumer” protected under the Magnuson-Moss Warranty Act. On February 21, 2013, Petitioner filed a Petition for Panel Rehearing, which was denied by the Eleventh Circuit on March 8, 2013.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED TO RESOLVE A CONFLICT CONCERNING THE SCOPE OF PROTECTED CONSUMERS COVERED BY THE MAGNUSON-MOSS WARRANTY ACT AS WELL AS THE EXTENT OF THAT PROTECTION.

Congress passed the Magnuson-Moss Warranty Act to protect consumers and courts should uphold the law and give relief to an unwary consumer victimized by an unscrupulous manufacturer and dealer who only want to maximize profits without regard to contractual obligations made to fix defective products. What is particularly egregious about this case is that all Respondents purposely violated the Magnuson-Moss Warranty Act and Federal Trade Commission practices by not showing or informing consumers—including Petitioner—about the 10-year hull warranty. This is why a manufacturer's written warranty that starts covering a product when it leaves the factory and before it enters the United States must benefit all purchasers of the product during the warranty term unless specifically limited by the express terms in the warranty—and no such limitation existed in this case. *See* Title U.S.C. § 2301, *et seq.*, and 16 C.F.R. 701.3(a)(1). Despite the absence of such limiting language in the warranty, both the District Court and the Eleventh Circuit chose to disregard the Magnuson-Moss Warranty Act and instead interpreted the Respondent manufacturer's warranty obligations as benefitting only Respondent dealer for the entire 10-year period. Such a ruling affects a broad class of consumers that Congress intended to protect when it passed the Magnuson-Moss Warranty Act, and review of this case is essential to

insure that all such consumers—including Petitioner—are protected from those entities that would deny them the benefit of federal consumer protection laws.

In ruling against Petitioner as to the warranty claims, the Eleventh Circuit erred in two respects: first, by incorrectly characterizing Petitioner as falling within the first category of “consumer” as defined under the Magnuson-Moss Warranty Act, and second, by finding that the 10-year hull warranty was not a “written warranty” under that Act (leading to its holding that Petitioner was not entitled to enforce the warranty under that statute.) As to the definition of “consumer”, there are three categories of consumers under the Magnuson-Moss Warranty Act, with the Eleventh Circuit placing Petitioner only in the first one: “a buyer (other than for purposes of resale) of any consumer product”. Petitioner should have been considered a consumer for purposes of the Magnuson-Moss Warranty Act under the third definition as well:

(3) “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).”

15 U.S.C. §2301(3).

The Eleventh Circuit’s failure to recognize Petitioner’s status as a consumer under the third definition is critical, for Petitioner’s right to enforce the 10-year hull warranty **under state law** makes the issue of whether that warranty was a “written warranty” irrelevant—the second error made by the Eleventh Circuit in construing the Magnuson-

Moss Warranty Act. In so doing, the Eleventh Circuit authored an opinion in direct conflict with the Seventh Circuit's opinion in *Voelker v. Porsche Cars North America, Inc.*, 353 F.3d 516 (7th Cir. 2003). In *Voelker*, the Seventh Circuit held that a "Category 3" consumer under the Magnuson-Moss Warranty Act may seek enforcement of a warranty which does not meet the Act's strict definition of "written warranty":

For Voelker to state a valid claim, however, **the New Car Limited Warranty need not meet the definition of written warranty contained in [15 U.S.C.] §2301(6).** Because Voelker is a category three consumer *entitled under state law* to enforce the New Car Limited Warranty, he is a consumer allowed under the Magnuson-Moss Act to enforce the New Car Limited Warranty.

Id. at 526. (*Emphasis added*).

Although courts have not uniformly agreed with *Voelker's* analysis on this issue, Florida state courts—including the Supreme Court of Florida—have expressly considered, analyzed, and adopted *Voelker's* holding that a category 3 consumer can enforce a warranty under the Magnuson-Moss Warranty Act even though the warranty does not meet that Act's strict, limiting definition of a "written warranty". In *American Honda Motor Company, Inc. vs. Cerasani*, 955 So.2d 543 (Fla. 2007), the Supreme Court of Florida addressed *Voelker* and the "written warranty" definition under the MMWA, and after conducting an extensive analysis of both the Magnuson-Moss Warranty Act and warranty law under Florida state statutes, the Court stated:

Therefore, we conclude that the type of warranty enforceable under applicable state law should be derived not from the MMWA definition of “written warranty” but rather from applicable state law.

American Honda, supra at 548.

Here, Petitioner, in its Second Amended Complaint, pled a cause of action for “Breach of Express Warranty Claim Against Azimut-Benetti Under Florida Law.” (Count IV). In that count, Petitioner alleged that the 10-year hull warranty “is an express warranty as defined by Florida Statute § 672.313”. The Eleventh Circuit’s analysis of why the 10-year hull warranty was unenforceable by Petitioner under the Magnuson-Moss Warranty Act did not take into account either the *Voelker* decision or the fact that the holding in *Voelker* has been adopted as the law in Florida by that state’s Supreme Court. The Eleventh Circuit also held that Petitioner could not enforce the subject warranty because under Florida contract law, the only third parties that may enforce a contract are “intended beneficiaries” of the contract. The Eleventh Circuit went on to decide that Petitioner “was, at most, an incidental beneficiary of the agreement” between Respondents, rather than an intended beneficiary. This reasoning was flawed because the Court failed to consider applicable federal law which places the burden exclusively on the issuer of a warranty—in this case, Respondent AZIMUT-BENETTI SpA (the manufacturer)—to place language in that warranty if it intends to limit the persons to whom said warranty applies. In other words, by failing to follow federal law applicable to consumer warranties (specifically, 15 U.S.C. §2301 *et seq.* and 16 C.F.R. 701.3(a)(1)), the 10-year hull

warranty issued by Respondent AZIMUT-BENETTI did not limit its applicability to a specific person or entity (*e.g.*, the other Respondent, as asserted by the District Court) and instead, made the warranty (by omission of such limiting language) enforceable by all subsequent purchasers of the subject vessel—including Petitioner. Thus, as a matter of law, Petitioner must be considered an “intended beneficiary” of the warranty created by Respondents, entitled to enforce same.²

Thus it is clear that in several critical respects, the Eleventh Circuit misconstrued, and misapplied, core principles and provisions of the Magnuson-Moss Warranty Act, and for this reason, review should be granted by this Court.

2. Petitioner’s reasoning is consistent with the now ironic finding of the Eleventh Circuit that the yacht was intended by Respondents for resale to third parties.

CONCLUSION

WHEREFORE, BASED ON the argument and authorities cited above, Petitioner MARLBOROUGH HOLDINGS GROUP, LTD., respectfully requests the Supreme Court grant review of this matter.

Respectfully submitted,

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