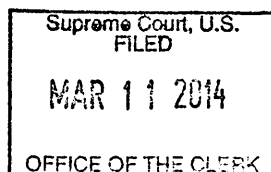


13-1109
No. _____



In the Supreme Court of the United States

CHRISTINE SENEY, et al.,
Petitioners,

v.

RENT-A-CENTER, INC. and
RENT-A-CENTER EAST, INC.,
Respondents.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit*

PETITION FOR WRIT OF CERTIORARI

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March 11, 2014

QUESTION PRESENTED

The question presented is whether the Federal Trade Commission's ban on pre-dispute binding arbitration under the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 *et seq.* applies to the *lease* of consumer goods or whether it is limited to the *sale* of consumer goods in which title passes to the buyer.

LIST OF PARTIES

The petitioners in this case are Christine Seney, her husband Antwan Seney and their two minor children (the “Seneys,” plaintiffs-appellants below). The respondents are Rent-A-Center, Inc. and Rent-A-Center East, Inc. (“RAC,” defendants-appellees below).

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**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

The Seneys respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit affirming the district court Order granting the motion of RAC to compel arbitration and dismissing the case with prejudice.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 738 F.3d 631 (Pet. App. A). The district court's order (Pet. App B) is reported at 909 F. Supp. 2d 444 (Pet. App. C).

JURISDICTION

The decision of the Court of Appeals was entered on December 11, 2013. Pet. App. A. A petition for rehearing was denied on January 7, 2014. Pet. App. D. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions, 15 U.S.C. § 2301 *et seq.* are reprinted at Pet. App. E.

Pertinent regulations of the Federal Trade Commission ("FTC") are reprinted at App. F.

Pertinent Maryland statutory provisions are reprinted at Pet. App. G.

STATEMENT OF THE CASE

This Petition presents an issue of federal statutory interpretation of concern to all consumers of leased goods. Although the Fourth Circuit initially correctly held that regulations promulgated by the FTC, pursuant to its authority to interpret the Magnuson-Moss Warranty Act (“MMWA” or “the Act”), prohibited pre-dispute binding arbitration, it erroneously found that such ban did not apply to a *lease* of consumer goods. The Fourth Circuit’s holding that the FTC ban on pre-dispute binding arbitration is limited to *sales* of consumer goods is contrary to the Act’s language and FTC legislative regulations. The ruling, unless reversed, would stand as a precedent that would eliminate the MMWA’s judicial remedy afforded to consumers of leased goods damaged by breach of any obligation under a warranty or service contract.

A. BACKGROUND

Christine Seney entered into a “Rental-Purchase Agreement” with RAC for a wooden trundle bed and mattresses. The Seneys agreed to rent the bed for two weeks, with an option to renew the lease or purchase. If leased for another six months, title would pass to the Seneys. A “Consumer Arbitration Agreement” was attached to the contract. That agreement contained a provision that required all claims, with limited exceptions, arising out of or relating to the contract with RAC, to be subject to binding arbitration. RAC agreed to maintain the rental property in good working condition and provide all necessary service or replacement.

RAC delivered the items and set them up in the bedroom of the Seneys' five-year old son. The child then began experiencing itchy bites and a rash that progressively worsened. Upon notification, RAC removed the mattresses, which were infested with bed bugs. RAC delivered two new mattresses but did not replace the bed bug-infested bed frame. Following continued bites, the Seneys again contacted RAC, who agreed to remove the entire bed. Without encasing it to prevent shedding of bed bugs, a RAC employee carelessly dragged the infested bed out of the house. Because the bed bugs spread throughout the home, Christine Seney requested RAC to hire an exterminator.

Following a 10-day delay, a pest control company performed partial treatment, and the home remained infested with bed bugs. RAC refused to pay for any further treatment of the home despite knowing that the initial partial treatment did not eradicate the bed bugs. Such refusal was with full knowledge that the Seneys could not afford the treatment and that their dwelling and belongings would be subjected to worsened infestation.

The Seneys filed a civil action in state court against RAC under the MMWA seeking compensatory damages and attorneys' fees for breach of implied and express warranties and failure to properly perform maintenance services. After removal, the district court granted RAC's motion to dismiss and compel arbitration pursuant to RAC's pre-dispute binding arbitration provision and dismissed the case with prejudice.

REASONS FOR GRANTING THE PETITION

The Fourth Circuit affirmed the district court's order on a ground that, prior to oral argument, was not raised as a defense by RAC. The issue of the applicability of the Act to rental agreements was raised by the Court for the first time at oral argument. Having raised the issue, the Court thereupon instructed counsel to submit a list of cases on that general point, but with no briefing.¹ The case was thus decided *sua sponte*, without the usual briefing accompanying a properly raised and preserved legal issue.

The Fourth Circuit thus identified an issue which allowed it to avoid addressing the conflict between two major doctrines of statutory construction:

In *Shearson/American Express, Inc. v. McMahon*, the Supreme Court instructed *courts* to evaluate the arbitrability of statutory rights in light of the liberal "federal policy favoring

¹ The Seneys' Supplemental submission advised the Court of the cases holding that MMWA applies to lease transactions. *See e.g., Voelker v. Porsche Cars N. Am., Inc.*, 353 F.3d 516, 525 (7th Cir. 2003); *Cohen v. AM General Corp.*, 264 F. Supp. 2d 616 (N.D. Ill. 2003); *Ryan v. Am. Honda Motor Co.*, 186 N.J. 431, 896 A.2d 454 (2006); *O'Connor v. BMW of North Am., Inc.*, 905 So.2d 235 (Fla. App. 2005); *Mesa v. BMW of N. Am., LLC*, 904 So. 2d 450, 458 (Fla. Dist. Ct. App. 2005); *Peterson v. Volkswagen of Am., Inc.*, 272 Wis. 2d 676, 679 N.W.2d 840 (2004), *aff'd* 281 Wis.2d 39, 697 N.W.2d 61 (2005). The Seneys further informed the Court of other cases holding that a lessee cannot sue under the MMWA. *See Parrott v. DaimlerChrysler Corp.*, 212 Ariz. 255, 130 P.3d 530 (2006); *DiCintio v. DaimlerChrysler Corp.*, 97 N.Y.2d 463, 768 N.E. 1121 (2002); *Sellers v. Griffin*, 526 So. 2d 147 (Fla. App. 1988).

arbitration.” 482 U.S. 220, 226, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987). *McMahon* established that if a statute is silent with respect to arbitration, courts should presume its permissibility. *Id.* at 226-27. *McMahon*, however, did not address whether *agencies* should also presume the permissibility of arbitration. The FTC, the agency that promulgated regulations interpreting the MMWA, did not employ a pro-arbitration presumption. See 40 Fed. Reg. at 60, 210. Rather, as explained above, it concluded that pre-dispute binding arbitration was impermissible under the Act. 16 C.F.R. § 703.5(j). Pursuant to the Supreme Court’s directive in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, that interpretation, if reasonable, should control. 467 U.S. 837, 842-43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

738 F.2d 631, at *10.

The Court then noted that courts have divided over application of *Chevron* in light of *McMahon*:

The way in which *Chevron* squares with *McMahon*, however, is uncertain, and courts have divided on the question. Compare *Davis*, 305 F.3d at 1277-80 (concluding that courts should assess the FTC’s arbitration ban under *Chevron*, but that the ban is unreasonable in light of *McMahon*) with *Walton*, 298 F.3d at 475-78 (holding that the *McMahon* presumption renders the otherwise-ambiguous MMWA clear, obviating the need for *Chevron* deference) and

Kolev v. Euromotors W./The Auto Gallery, 658 F.3d 1024, 1025-30 (9th Cir. 2011), opinion withdrawn, 676 F.3d 867, 867 (9th Cir. 2012) (explaining that courts engage in *Chevron* analysis, pursuant to which the FTC's regulation is permissible; the FTC need not apply the *McMahon* presumption because agencies need not subscribe to judicial canons).

738 F.2d 631, at *10.² The Fourth Circuit found it unnecessary "to enter the fray," 738 F.3d 631, at *10, by raising a defense on RAC's behalf that had never previously been raised by RAC, and then, without full briefing, invalidated the MMWA as it applies to consumer leases.

Without briefing, the Seneyes were not able to provide the Fourth Circuit with a discussion of other provisions of the Act and related regulations that bear

² The Seneyes argued that the FTC's gap-filling legislative regulations prohibiting pre-dispute binding arbitration, promulgated in the mid 1970's, should be viewed as a reasonable interpretation of MMWA because, among other reasons, they are compatible with then-controlling precedent in *Wilko v. Swan*, 346 U.S. 427 (1953), that a party cannot validly waive the right to select a judicial forum. *Wilko* remained law for 36 years until it was overruled by *Rodriguez de Quijas v. Shearson/Am. Express*, 490 U.S. 477 (1989). The FTC legislative regulations thus cannot be considered arbitrary and capricious by virtue of failing to contemplate that binding precedent would be overturned a decade later. The longstanding regulations were promulgated well prior to the Supreme Court's recognition of a "pro-arbitration presumption." See *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226-27 (1987). Contrary to the issue framed by the Fourth Circuit, *McMahon* cannot be reasonably construed to impose the fiction of a retroactive presumption.

on arriving at a correct interpretation of the statutory and regulatory scheme. As discussed below, the judicial remedy afforded by the Act is not limited to written warranties in *sales* agreements where title has passed. Rather, it also extends to lessees in possession of goods, beneficiaries of express and implied warranties under applicable State law, and consumer *service agreements* relating to a consumer product regardless of a sale. The Fourth Circuit narrowly focused on the definition of “written warranty,” 15 U.S.C. § 2301 (6), and thereby overlooked the statutory protection afforded to consumers under other provisions of the Act.

The Fourth Circuit’s opinion eviscerates the Act as it relates to consumer lease transactions, an important and growing sector of the nation’s economy. The MMWA is the most significant federal consumer protection legislation enacted within the last 39 years, and the full scope of its reach should be restored. This Court’s review is warranted.

I. THE SENEYS ARE “CONSUMERS” UNDER THE MMWA.

At issue is whether or not the FTC’s ban on pre-dispute arbitration under the MMWA applies to a lease of consumer goods with an option to purchase.³

³ Rent-to-Own (“RTO”) transactions allow consumers without credit to obtain immediate possession of household goods for weekly or monthly payments, and then decide whether to purchase or return the product. RTO is a growing industry that as of 2012 consisted of about 10,100 RTO stores in the United States, Canada and Mexico producing \$8.5 billion in annual revenues. RTO serves 4.8 million households at any given time of year. *The Rent to Own*

Under the MMWA, a consumer may sue for damages if the consumer “is damaged by the failure of a *supplier*, *warrantor*, or *service contractor* to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract.” 15 U.S.C. § 2310 (d)(1) (emphasis added).⁴ The MMWA’s definition of “consumer” is broken down into three categories:

[1] “a buyer (other than for purposes of resale) of any consumer product,”

[2] “any person to whom such product is transferred during the duration of an implied or written warranty (or service contract) applicable to the product,” or

Industry: An Overview, RTOHQ, <http://www.rtohq.org/about-rent-to-own/> (last visited Feb. 20, 2014). Low-income consumers often end up with high-cost payments on items acquired in this fashion. Lauren Coleman-Lochner, *New Kmart Rent-to-Own Turns \$300 TV Into \$415 Buy*, BLOOMBERG (Nov. 12, 2013, 5:59 PM), <http://www.bloomberg.com/news/2013-11-12/new-kmart-rent-to-own-program-turns-300-tv-into-415-buy.html>.

⁴ RAC satisfies all three of the italicized terms. The Act defines “supplier” as “any person engaged in the business of making a consumer product directly or indirectly available to consumers.” § 2301 (4). “Warrantor” is defined as “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.” § 2301 (5) (emphasis added). Section 2301 does not contain a definition of “service contractor,” but does define “service contract” to mean “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.” § 2301 (8).

[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). A plaintiff need only fall into one of the three categories in order to qualify as a “consumer” entitled to bring a claim under the MMWA. The Seneys satisfy two of the three categories.

A. The Product Was Transferred to the Seneys.

The term “consumer” includes “buyers” which implies persons who actually bought the product and hold title. But the definition is not limited to actual buyers holding title. “Consumer” also includes “any person to whom such product is transferred during the duration of an implied or written warranty (or service contract) applicable to the product.” § 2301 (3). This clause signifies a category other than a buyer with title, otherwise it constitutes verbiage which is merely repetitive surplusage. “Transfer” is a broader term than “sale.” Given its ordinary meaning, transfer of the product in this context means physical possession of the product during the warranty period or duration of the service contract. Nothing in the Act implies that “transfer” means that title must pass. *See Mesa v. BMW of N. Am., LLC*, 904 So. 2d 450, 455-56 (Fla. Dist. Ct. App. 2005), *Mangold v. Nissan N. Am., Inc.*, 347 Ill. App. 3d 1008, 809 N.E.2d 251, 253 (Ill. App. Ct. 2004), *Dekelaita v. Nissan Motor Corp.*, 343 Ill. App. 3d 801, 799 N.E.2d 367, 371 (2003). It is

undisputed that the Seneys had physical possession of the bed.

B. The Seneys Are Consumers Entitled Under State Law to Enforce the Obligations of the Warranty.

As defined in § 2301 (3) a “consumer” means a buyer . . . and any other person who is entitled . . . under applicable State law to enforce against the warrantor (or service contractor) the obligations of the warranty (or service contract).” § 2301 (3). This provision operates to incorporate by reference applicable State law. *See Voelker*, 353 F.2d at 525. There are several Maryland statutes which entitle the Seneys to enforce a warranty. First, under Maryland law, the implied warranty of merchantability applies to the *lease* of goods that “pass through physical possession of and are maintained by the lessor.” Md. Code Ann., Comm. Law § 2-314 (4); § 2A-212 (1) (“a warranty that goods will be merchantable is implied in a lease contract if the lessor is a merchant with respect to goods of that kind.”) *See also* § 2A-210 (express warranty). Remedies include the right to damages for breach of warranty. *See* § 2-715; § 2A-520.

A second Maryland statutory remedy that entitles the Seneys to enforce the warranty or service contract is the Consumer Protection Act (“CPA”). Md. Code Ann., Comm. Law § 13-301 *et seq.* Under this statute, consumers include prospective purchasers and lessees. § 13-301 (c) (“‘Consumer’ means an actual or *prospective* purchaser, *lessee*, or recipient of consumer goods, consumer services, consumer realty, or consumer credit.”) (emphasis added). The CPA gives

consumers a private right of action for damages arising from unfair or deceptive trade practices including a representation that “consumer goods . . . or consumer services are of a particular standard, quality . . . which they are not.” § 13-301 (2). *See also* § 13-301 (3). (“Failure to state a material fact if the failure deceives or tends to deceive.”) Section 13-408 provides a cause of action for damages for violations of the CPA.

C. The Seneys Were Entitled to Enforce the Service Agreement, Regardless of a Sale of the Product.

The Seneys are “consumers” within the meaning of § 2301 (3) for yet a third reason. A consumer includes not only buyers, but “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*).” § 2301 (3) (emphasis added). As noted by the Fourth Circuit, “RAC did provide, in the rental contract, its own warranty to repair, replace, and service the bed during the term of the lease.” 738 F.3d 631, at *3. This was a “service contract” within the meaning of the Act.

As defined in § 2301, “[t]he term ‘service contract’ means 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.” § 2310 (8).⁵ This is exactly what RAC agreed to perform, regardless of whether the Seneys ultimately purchased the trundle bed. Significantly, this definition does not require a *sale* of a product.

D. The Act Does Not Limit Remedies to Breach of “Written Warranties” in Sales Contracts.

The Act provides for a consumer to file suit against not only warrantors, but suppliers and *service providers*. Subject to any applicable nonbinding informal dispute settlement procedure, the Act provides the following broad right to file suit:

A consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this title [15 U.S.C. §§ 2301 et seq.], or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief.

15 U.S.C. § 2310 (d) (1). Based on this provision, the Seneys’ claims are within the ambit of the MMWA

⁵The Federal Trade Commission (“FTC”) defines a service contract as:

An agreement which relates only to the performance of maintenance and/or inspection services and which is not an undertaking, promise, or affirmation with respect to a specified level of performance, or that the product is free of defects in materials or workmanship, is a service contract. . . .

16 C.F.R. § 700.11.

with respect to the written and implied warranties and the service contract that were breached, regardless of the breach occurring during the rental period.

In 1977, the FTC promulgated Rule 700.8, which precludes a warrantor from "indicat[ing] in any written warranty or *service contract* . . . that the decision of the warrantor, service contractor, or any designated third party is final or binding in any dispute concerning the warranty or service contract." 16 C.F.R. § 700.8 (emphasis added). The FTC made clear that any such statement that a decision is final or binding is "deceptive since section 110(d) of the Act gives state and federal courts jurisdiction over suits for breach of warranty and service contract." *Id.* This interpretive rule under the MMWA further clarifies the FTC's consistent and longstanding position precluding pre-dispute binding arbitration.

Thus, the Fourth Circuit clearly erred in holding that "the FTC ban applies only to dispute settlement procedures included in a 'written warranty.'" 738 F.3d 631, at *12.

E. The Act Allows Suit Premised on Any Failure to Comply With Any Obligations of the Act.

RAC's failure to disclose its position that the written warranty (or service contract) could not be enforced, unless the defective bed was *purchased*, violates RAC's obligations under the Act to avoid misleading consumers. This gives rise to a cause of

action under § 2310 (d) (1) (“failure to comply with any obligations under this title”).⁶

An interpretation that RAC’s “own warranty to repair, replace, and service the bed,” 738 F.3d 631, at *3, is outside the protection of the Act, has implications bearing on the potential to deceive consumers as to its enforceability under the Act.⁷ Silence on a material fact may be deceptive.⁸ There is

⁶ Section 2302 sets forth the “[r]ules governing the contents of warranties,” and provides that “any warrantor warranting a consumer product by means of a written warranty shall, to the extent required by the rules of the Commission, fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty.” § 2302 (a). The Act is not limited to governance of warranty terms within consummated sales. It also regulates the terms of warranties *prior to the sale* of the consumer product. The Act provides that “[t]he Commission shall prescribe rules requiring that the terms of any written warranty on a consumer product be made available to the consumer (or prospective consumer) *prior to the sale* of the product to him.” § 2302 (b) (a) (A).

⁷ The Act directs the FTC to promulgate rules that require warranty language to be communicated in a way so as to not mislead the reasonable, average consumer. § 2302 (a) (13). RAC’s belated argument that the implied warranty is disclaimed or modified (*i.e.*, eliminated) during the rental phase of a prospective purchase of a consumer product also runs afoul of § 2308. This provision generally prohibits modifications of any implied warranty to a consumer. (“No supplier may disclaim or modify . . . any implied warranty to a consumer with respect to such product if (1) such supplier makes any written warranty to the consumer with respect to such consumer product . . .”). § 2308.

⁸ According to the FTC, “absolute silence on a material fact may be deceptive where the public assumes from this silence that a state

no disclosure in RAC's contract advising that the express and implied warranties and service contract are not enforceable, unless and until the consumer purchases the item. The RAC contract fails to disclose that such rights under the Act only arise at the point of sale. Contrary to ordinary, reasonable behavior, this interpretation would require consumers of "rent-to-own" goods to knowingly purchase a defective product in order to obtain warranty or service contract protection under the Act. This is incompatible with the consumer protection purposes of the Act.

CONCLUSION

For the reasons set forth herein, Petitioner respectfully requests that this Honorable Court grant the Writ of Certiorari.

of facts exists when, in fact, affirmative disclosure would reveal that these assumptions are unfounded. In such instances, the consumer's normal and reasonably foreseeable expectations are exploited, and a false or misleading impression is created." 40 Fed. Reg. 60,168, 60,170 (Dec. 31, 1975) (quoted in *Cunningham v. Fleetwood Homes of Georgia, Inc.*, 253 F.3d 611, 622 fn. 14 (11th Cir. 2001)).

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