Dissenting Statement of Commissioner Maureen K. Ohlhausen
In the 2015 Magnuson-Moss Warranty Act Review
Project No. P114406
May 21, 2015

I voted against the Commission's Final Revised Interpretations of the Magnuson-Moss Warranty Act (MMWA) Rule because it retains Rule 703.5(j)'s prohibition on pre-dispute mandatory binding arbitration.[1]

Since the last Rule review in 1997, two federal appellate courts have held that the MMWA does not prohibit binding arbitration.[2] Noting the federal policy favoring arbitration expressed in the Federal Arbitration Act (FAA),[3] these courts concluded that the MMWA's statutory language and legislative history did not overcome the presumption in favor of arbitration and that the purposes of the MMWA and the FAA were not in inherent conflict. The courts also declined to give the Commission's contrary interpretation *Chevron* deference.[4] Although some lower courts have reached a different conclusion, there is no circuit court precedent upholding the Commission's interpretation of the MMWA in Rule 703.5(j). Additionally, in several recent cases, the Supreme Court has indicated a strong preference for arbitration.[5]

The courts have sent a clear signal that the Commission's position that MMWA prohibits binding arbitration is no longer supportable.[6] When faced with such a signal, the Commission should not reaffirm the rule in question. I therefore respectfully dissent.

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[1] I do not object to the other final actions taken in this review.
[2] *See Walton v. Rose Mobile Homes, LLC*, 298 F.3d 470 (5th Cir. 2002); *Davis v. Southern Energy Homes, Inc.*, 305 F.3d 1268 (11th Cir. 2002).
[3] 9 U.S.C. §1. *See Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220 (1987) (noting that the presumption of the FAA is that arbitration is preferable and Congress must clearly override that presumption if it is to be disregarded).
[4] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (holding that courts defer to an agency's interpretation of a statute if "(1) Congress has not spoken directly to the issue; and (2) the agency's interpretation 'is based on a permissible construction of the statute'").
[5] *See, e.g,. Am. Express Co. v. Italian Colors Rest*., 133 S. Ct. 2304 (2013), *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).
[6] *See Davis*, 305 F.3d at 1280 ("[T]he FTC's interpretation of the MMWA is unreasonable, and we decline to defer to the FTC regulations of the MMWA regarding binding arbitration in written warranties.").