

>> ORDER IN THE COURT.
THE SUPREME COURT OF FLORIDA IS
NOW IN SESSION.
CHIEF JUSTICE CHARLES CANNADY
PRESIDING.

>> GOOD MORNING AND WELCOME TO
THE FLORIDA SUPREME COURT.
THE FIRST CASE ON TODAY'S DOCKET
IS LES KROL VERSUS FCS US LC.
COUNSEL, PLEASE PROCEED.

>> GOOD MORNING, JUSTICES, MAY
IT PLEASE THE COURT, MY NAME IS
THEODORE GREENE HERE ON BEHALF
OF MORGAN & MORGAN FOR LES KROL
AND I WOULD LIKE TO RESERVE FIVE
MINUTES FOR REBUTTAL ARGUMENT
PLEASE.

IN 1975 CONGRESS PASSED THE
MAGNUSON MAAS FEDERAL TRADE
COMMISSION IMPROVEMENT ACT
BECAUSE OF ITS CONCERN WITH
WARRANTY VIOLATIONS AND THE
FTC'S INABILITY TO CONTROL THEM.
AS THIS COURT EXPLAINED IN 2007
CONGRESS AND ADMITTED THE ACT TO
PROTECT THE ULTIMATE USER OF THE
PRODUCT.

AS THE DEFENDANT PUT IT TO THE
FIFTH DISTRICT COURT OF APPEALS
IN THE ANSWER BRIEF ON PAGE 19
AND I AM READING WORD FOR WORD
THE PURPOSE OF THE MAGNUSON LOSS
WARRANTY ACT IS TO IMPROVE THE
ADEQUACY OF INFORMATION
AVAILABLE TO CONSUMERS AND
PREVENT DECEPTION.

TO ACHIEVE THOSE GOALS CONGRESS
EMPOWERED THE FTC TO REGULATE
WARRANTIES AND WARRANTY RELATED
ISSUES IN A NUMBER OF WAYS.
SECTION 2302 OF THE ACT EMPOWERS
THE FTC TO REGULATE WHAT IS
CONTAINED IN THE CONTENT OF THE
WARRANTY AND THE FTC USED ITS
AUTHORITY UNDER SECTION 23022
AND ASK REGULATION 701.3 WHICH
HAS BECOME KNOWN IN THE WORLD OF
THE JUDICIARY IS THE SINGLE
DOCUMENT RULE.
ESSENTIALLY WITH A SINGLE

DOCUMENT RULE REQUIRES IS IN ORDER FOR A WARRANTY TERM OR CONDITION TO BE ENFORCEABLE IT MUST BE DISCLOSED WITHIN THE WRITTEN WARRANTY ITSELF.

IF IT IS NOT IN THE WRITTEN WARRANTY IT IS NOT VALID.

2302 A AND THE MPOWER THE FTC TO REQUIRE INCLUSIONS IN THE WARRANTY, A POINT I DON'T SEE DISCUSSED IN THE CASE LAW VERY MUCH IS IN SECTION 2302 D CONGRESS AUTHORIZED THE FTC TO PROVIDE CERTAIN PROVISIONS IN TERMS WHICH COULD BE EXCLUDED FROM THE WARRANTY BUT INCORPORATED BY REFERENCE INTO IT.

THAT IS AN IMPORTANT POINT BECAUSE NOT ONLY HAS THE FTC REQUIRED THE CONTENTS HE INCLUDED IN THE WARRANTY IN ORDER TO BE ENFORCEABLE THERE IS NO FTC RULE THAT ALLOWS INCORPORATION OF TERMS OUTSIDE THE WARRANTY.

>> AT THE END OF THE DAY THE SINGLE DOCUMENT LOSING 16 CFR 701.3 AND HAS A FINITE LIST OF DISCLOSURES, IT SAYS SHALL CLEARLY CONSPICUOUS WILL DISCLOSE AN ETHICAL DOCUMENT AND SUPPORT LANGUAGE, THE FOLLOWING ITEMS AND INFORMATION AND THERE IS NO CATCH ALL AND NOW KIND OF GENERAL, NO -- NOTHING THAT SAYS ANY MATERIAL TERM OR ANYTHING LIKE THAT SO IT IS A LIST OF SPECIFIC ITEMS SO IT SEEMS IN ORDER FOR YOU TO PREVAIL YOU'VE GOT TO FIND SOMETHING ON THIS LIST THAT INCLUDES THE ARBITRATION PROVISION THAT IS THE ISSUE HERE.

LOOKING THROUGH THESE ITEMS IT DOESN'T SEEM ANY OF THESE COVER THAT.

>> SEVERAL ITEMS COVER IT.

I'M LOOKING AT 701.3 ENTITLED WRITTEN WARRANTY TERMS AND IT

SAYS A WARRANT SHALL
CONSPICUOUSLY DISCLOSE IN A
SINGLE DOCUMENT IN SIMPLE
READILY AVAILABLE LANGUAGE OF
THE FOLLOWING ITEMS, NUMBER 3, A
STATEMENT OF WHAT THE WARRANTOR
WILL DO IN THE EVENT OF A
FAILURE TO CONFORM WITH THE
WRITTEN WARRANTY.

THERE ARE A COUPLE WORDS, DEFECT
OR MALFUNCTION PRIOR TO THAT BUT
YOU WILL NOTICE THE COMMENTS AND
THEN OR.

A STATEMENT OF WHAT THE
WARRANTOR WILL DO IN THE EVENT
THAT IT FAILS TO CONFORM WITH
THE WARRANTY, NOT A BROAD
STATEMENT BY THE FTC, IT
REQUIRES ANYTHING THAT RELATES
TO WHAT THE WARRANTOR WILL DO TO
BE INCLUDED BUT NUMBER 5 SAYS A
STEP-BY-STEP EXPLANATION OF THE
PROCEDURE -

>> THE PROVISION YOU ARE TALKING
ABOUT SEEMS TO ME IF YOU LOOK AT
THAT IN CONTEXT, REFERRING TO
STEPS, THE WAR AND WILL TAKE TO
FIX THE PROBLEM.

THEY UNDERTAKE CERTAIN STEPS
SHORT OF LEGAL ACTIONS THAT
MIGHT BE INSTITUTED OR BINDING
ARBITRATION, DIFFERENT FOCUS IN
THAT PROVISION.

WHAT AM I MISSING?

>> THE FIRST TWO THINGS THAT ARE
REQUIRED, I FOCUSED ON THE THIRD
ONE.

A DEFECT OR MALFUNCTION.

I CONTEND YOU ARE RIGHT.

IN REGARD TO A DEFECT OR A
MALFUNCTION RELATES ONLY TO
THOSE, TO CORRECT IT.

2310 D WHICH PROVIDES FOR
CONSUMER ACTION UNDER LIMITED
WARRANTY.

ALL VEHICLE WARRANTIES ARE
LIMITED WARRANTIES.

AND 2310 D.

AND SO 2310 D PROVIDES LEGAL
REMEDIES.

AND THE FIRST TWO PARTS -- I
APOLOGIZE.

I HAVE TO KEEP A PHONE IN CASE I
GET DISCONNECTED.

I DON'T KNOW HOW TO -- I DID
THAT ON MY CELL PHONE, DON'T HOW
TO DO IT ON MY OFFICE PHONE.

I APOLOGIZE.

I CAN THROW IT OUT THE ROOM IF
YOU LIKE.

WE HAVE TO GIVE THEM A CHANCE TO
CURE OR TO PURSUE LEGAL
REMEDIES.

AND A REASONABLE
OPPORTUNITY.

WHAT HAPPENS IF THEY DON'T, THAT
IS WHERE WE GET INTO THE
PROVISION OF A FAILURE TO
CONFORM WITH THE WRITTEN
WARRANTY.

NUMBER 5 SAYS A STEP-BY-STEP
EXPLANATION OF THE PROCEDURE THE
CONSUMER SHOULD FOLLOW TO OBTAIN
PERFORMANCE OF THE WARRANTY
OBLIGATION, THAT TOO IS BROAD
AND INCLUDES LEGAL REMEDIES WE
MUST SEEK.

>> LET'S GO BACK, IN THE RULE
THE FINITE LIST, WE HAVING THE
STATUTE THE AUTHORITY TO ADOPT
THIS RULE AND THE STATUTES THE
FIRST TO THE FDC AS FAR AS WHAT
IS REQUIRED BUT THE STATUTE
GIVES AN ILLUSTRATIVE LIST OF
THINGS THE FTC MAY REQUIRE TO BE
DISCLOSED.

ONE OF THOSE IS A BRIEF GENERAL
DESCRIPTION OF THE LEGAL
REMEDIES AVAILABLE.

THE OTHER OPTIONS INCLUDE THE
THINGS, THE STEP-BY-STEP ISSUE,
THE STATEMENT OF WHAT THE
WARRANTOR WILL DO IN CASE OF A
DEFECT MALFUNCTION SO IF I READ
THESE THINGS TOGETHER, THE BRIEF
GENERAL DESCRIPTION OF LEGAL
REMEDIES AVAILABLE TO THE
CONSUMER WHICH FTC DIDN'T
INCLUDE IN THE RULE IS DIFFERENT
FROM THESE OTHER THINGS YOU ARE

POINTING TO.

>> I SEE THE FTC REGULATION AS A GRADUAL MOVE UP THE SPECTRUM. YOU START WITH REPAIRS, THE DEFECT AND MALFUNCTIONS AND IF THEY CAN'T REMEDY THE VEHICLE IN A REASONABLE TIME THAT IS REQUIRED OF THE ACT, 2310 D IS THE PROVISION THEY HAVE ONLY REASONABLE OPPORTUNITY TO CURE. IF THEY CAN'T CURE YOU MOVE INTO THE FAILURE TO CONFORM THE WARRANTY.

THERE IS ALSO SECTION 8, ANY EXCLUSIONS OR LIMITATIONS ON RELIEF.

>> THE QUESTION IS IMPORTANT IF YOU RELY ON THE TEXT OF SUBSECTION 3, AN ANSWER TO THAT, MAYBE JUSTICE MUNIS COULD STATE IT AGAIN.

>> THE QUESTION, THE ACT GIVES THE FTC SOME SUGGESTIONS, SUGGESTIONS INCLUDE -

>> I'M NOT HEARING ANYTHING.

>> CAN YOU HEAR ME NOW?

>> YES, SIR.

>> THE STATUTE DOESN'T TELL THE FTC WHAT IT INCLUDES BUT ONE OF THE QUESTIONS IS A STATEMENT OF WHAT THE WARRANTOR WILL DO AN EVENT OF A DEFECT, MALFUNCTION OR FAILURE TO CONFORM WITH SUCH WRITTEN WARRANTY AND A CORRESPONDING PROVISION IN THE WORLD.

THE ANOTHER ONE IS THE STEP-BY-STEP PROCEDURE WHICH THE CONSUMER WOULD TAKE TO OBTAIN PERFORMANCE OF ANY OBLIGATION UNDER THE WARRANTY.

THERE IS A CORRESPONDING PROVISION IN THE RULE.

FINALLY THERE IS ANOTHER SUGGESTION THAT IS A BRIEF GENERAL DESCRIPTION OF THE LEGAL REMEDIES AVAILABLE TO THE CONSUMER.

FOR WHATEVER REASON THE FTC DID NOT INCLUDE THAT PROVISION IN

ITS RULE.

WHY SHOULD WE READ THAT TYPE OF LANGUAGE TO WHAT THE FTC DID INCLUDE THEN IT IS OBVIOUS THE STATUTE CONSIDER THAT A DISTINCT CATEGORY OF INFORMATION.

>> IS YOUR QUESTION WHY THE STATUTORY SOME BENIGN IS NOT INCLUDED IN THE REGULATION?

>> I'M NOT ASKING YOU TO TELL ME WHY IT IS NOT INCLUDED.

I AM ASKING WHY SHOULD WE READ THAT REQUIREMENT INTO WHAT IS INCLUDED WHEN IT IS CLEAR THE FTC FOR WHATEVER REASON SHOWS NOT TO INCLUDE IT EVEN THOUGH IT INCLUDED THESE OTHER THINGS.

>> I CONTEND THE FTC INCLUDED SUB 9 OF THE STATUTE, THAT IS WHERE I GO TO SUB 8 OF THE RULE WHICH INCLUDES ANY SECLUSION OR LIMITATION ON RELIEF AND A BINDING ARBITRATION RATHER THAN JUDICIAL RESOLUTION WOULD BE A LIMITATION ON THE RELIEF AVAILABLE TO MY CLIENT.

IN FACT IT ACTUALLY GIVES EXAMPLES OF THINGS THAT COULDN'T BE RECOVERED IN FTC SUB 8 SO IT DID INCLUDE THAT, THE LANGUAGE IS DIFFERENT BUT DIDN'T INCLUDE THAT PROVISION.

>> HOW DOES IT AFFECT YOUR ARGUMENT THAT THE FTC, WHICH MIGHT BE THE AUTHOR OF THE SINGLE DOCUMENT RULE, DOESN'T BELIEVE FINDING ARBITRATION IS ALLOWABLE UNDER THE STATUTE AND UNDER ITS OWN RULES?

DOES IT MAKE SENSE THE FTC WOULD REQUIRE DISCLOSURE OF AN ITEM THE FTC ITSELF DOESN'T EVEN THINK SHOULD BE PERMITTED AT ALL?

>> TWO QUESTIONS, DON'T KNOW IF YOU WANT ME TO GO INTO THE ISSUE OF THEM SAYING THERE IS NO BINDING ARBITRATION, I AGREE WITH THE FTC BUT THAT'S NOT THE ISSUE WE BROUGHT BEFORE THIS

COURT TODAY.

WITH REGARD TO THE SECOND PIECE
I CONTEND 701.3 IS A BROAD
DESCRIPTION OF WHAT MUST BE
INCLUDED AND IT IS MY CONTENTION
THE SUB 92302 IS INCORPORATED BY
SUB 8.

I THINK THEY SAID AND THERE
HASN'T BEEN ANY RULING FROM ANY
COURT THAT I'M AWARE OF THAT HAS
SAID THE FTC DIDN'T INCLUDE
PROVISIONS IN HERE.

THERE HAS BEEN NO RULING.

>> WE CAN READ THE LIST, THE
LIST IS WHAT IT IS.

THERE IS NO CATCH ALL.

ARE YOU NOT, IT SEEMS LIKE THE
CUNNINGHAM CASE WHICH SEEMS, THE
COURTS HAVE BEEN SYMPATHETIC TO
YOUR ARGUMENT AND RELIED ON
THAT, THAT TURNED ON THE BINDING
ARBITRATION WITH INFORMAL
DISPUTE SETTLEMENT MECHANISM.

ARE YOU NOT RELYING ON THAT?

>> I'M TRYING TO ANSWER THE
QUESTION BUT IT IS MULTI-PART.
THE FTC, YOU ARE RIGHT, IS
FINITE.

IS NOT AN ENDLESS LIST BUT THAT
LIST IS BROAD ENOUGH TO
ENCOMPASS BINDING ARBITRATION
BECAUSE IT SAYS IN A NUMBER OF
WAYS YOU'VE GOT TO INCLUDE
PROVISIONS AND NO COURT HAS SAID
THAT LIST LEAVES OUT LOTS --
LOTS OF THINGS, NOBODY HAS
CONTENDED THAT.

THAT IS NEW ARGUMENT RAISED
TODAY BUT YOUR NEXT PART, COURTS
THAT HAVE GONE MY WAY THAT ARE
SYMPATHETIC AND RELIED ON
CUNNINGHAM THEY SAID CUNNINGHAM
SAID BINDING ORDERS LIKE
INFORMAL DISPUTE RESOLUTION, THE
COURTS AGAINST CUNNINGHAM, THERE
WERE NOT OTHER APPELLATE COURTS,
THEY WERE LARGELY DISTRICT
COURTS AND LARGELY THE ALABAMA
SUPREME COURT BUT VIRTUALLY
EVERY JURISDICTION THAT LOOKED

AT THIS ISSUE SAID THAT IS NOT WHAT THE COURT DID.

>> AMOS AGAINST SYNERGY, THE CASE WRONGLY DECIDED, ELEVENTH CIRCUIT CASE IN 2002?

>> I THINK IT IS CORRECTLY DECIDED AND SHOULD BE READ IN CONJUNCTION WITH CUNNINGHAM. IF I MAY WITH CUNNINGHAM THIS IS IMPORTANT, I WANT TO ANSWER YOUR QUESTION, IN CUNNINGHAM, THE COURTS THAT HAVE DISAGREED SAID CUNNINGHAM HE EQUATED INFORMAL DISPUTE RESOLUTION WITH BINDING A JUST -- LEGISLATION THAT THAT IS NOT CUNNINGHAM DID.

BY LOOKING AT CUNNINGHAM HERE, 621 AND CUNNINGHAM SAYS THE FTC INCLUDES A STATEMENT THE WARRANTOR WILL DO IN CASE OF A DEFECT MALFUNCTION WITH FAILURE FOR THE WARRANTY WHICH IS ONE OF THE PROVISIONS I SAID BUT A STEP-BY-STEP EXPLANATION OF THE PROCEDURE CITES THE FTC RULE, STEP-BY-STEP EXPLORATION OF THE PROCEDURE THE CONSUMER SHOULD FOLLOW TO OBTAIN PERFORMANCE AT THE END OF THE WARRANTY WHICH IS THE OTHER PROVISION ISOLATED, INFORMATION RESPECTING INFORMAL DISPUTE RESOLUTION.

THE POINT TO ANSWER YOUR QUESTION, THAT WAS NOT ALL THE CUNNINGHAM COURT LOOKED AT. THE CUNNINGHAM COURT SAID THERE ARE THREE PROVISIONS OF FTC RESOLUTION WHICH ENCOMPASS A BULL THAT REQUIRES BINDING ARBITRATION TO BE INCLUDED IN THE WRITTEN WARRANTY IF IT IS TO BE ENFORCEABLE.

NOW I WANT TO JUMP IF I ANSWERED YOUR QUESTION I WANT TO JUMP TO THE QUESTION ABOUT DAVIS WHICH WAS A SUPPLEMENT TO CUNNINGHAM AND I KNOW THAT FOR A COUPLE. HERE IS WHAT DAVIS SAID, 1272. AFTER A THOROUGH REVIEW OF THE MAGNUSON LOSS WARRANTY ACT IN

ITS LEGISLATIVE HISTORY, THE FAA FEDERAL ARBITRATION ACT AND THE SUPREME COURT'S APPLICATION TO OTHER FEDERAL STATUTES, WE CONCLUDE, HERE ARE THE MAGIC WORDS, THE MAGNUSON LOSS WARRANTY ACT PERMITS THE ENFORCEMENT OF A VALID BINDING ARBITRATION AGREEMENT WITHIN A WRITTEN WARRANTY AND THERE IS A FOOTNOTE RIGHT BY THAT NOT AT THE END OF THE SENTENCE BUT ABOVE IT, FOOTNOTE 1, HERE'S WHAT IT SAYS.

IN CUNNINGHAM THIS COURT DISCUSSED BINDING ARBITRATION OF MAGNUSON MOSS CLAIMS, THEY MEAN THAT IN THE GENERAL SENSE.

WE DECLINE TO RESOLVE THE GENERAL QUESTION HOWEVER BECAUSE IT WAS NOT NECESSARY TO THE RESOLUTION OF THAT CASE.

WE ARE NOT REQUIRED TO AND DO NOT DECIDE WHETHER MAGNUSON MOSS MAKES ARBITRATION AGREEMENTS UNENFORCEABLE AS WELL MAGNUSON MOSS CLAIMS NOR IS IT NECESSARY FOR US TO DETERMINE WHETHER WARRANTOR'S INCLUDE BINDING ARBITRATIONS IN THE WARRANTY.

THE DAVIS COURT IS EXPRESSLY SAYING, EXPRESSLY SAYING THEY ARE FINDING OF THE ARBITRATION ARBITRATION CLAUSE IS WITHIN THE WRITTEN WARRANTY IT IS ENFORCEABLE AND THEY ARE EXPRESSLY SAYING THAT IN CUNNINGHAM THE ONLY QUESTION WE WERE PRESENTED WITH WAS IF IT IS NOT IN THE WARRANTY IS IT ENFORCEABLE?

WHEN CUNNINGHAM ANSWERED THAT QUESTION IT MUST BE IN THE WARRANTY TO GET US TO THE NEXT STAGE DAVIS TOOK US TO THE NEXT STAGE AND THAT IF IT IS IN THE WARRANTY IT IS ENFORCEABLE.

>> YOU CONSIDERED THREE MINUTES OF YOU'RE A BOTTLE TIME, WE HAVE QUESTIONS TO ASK BUT YOU NEED TO

BE AWARE THE CLOCK IS TICKING ON YOUR REBUTTAL TIME.

>> I WILL WRAP UP WITH THIS. THE ANSWER IN FOOTNOTE 7 WHY THEY TACKLED IT IN THAT WAY, DAVIS AND CUNNINGHAM CAME TO CONCLUSIONS THAT WERE DIFFERENT BASED ON THE SCENARIO AND HERE IS WHAT THEY SAID.

WHILE WE MUST DEFER TO LEGISLATIVE REGULATIONS IN 16 CFR 701-03 IF THEY ARE REASONABLE THE FTC'S INTERPRETIVE REGULATIONS ARE ONLY ENTITLED TO BE PERSUASIVE BUT THE REGULATIONS UNDER 2302 ARE LEGISLATIVE AND REQUIRED DIFFERENCE BY THE COURT BUT THOSE THAT SAY NO BINDING ARBITRATION UNDER 2310 ARE MERELY SUGGESTED FROM THE COURT'S PERSPECTIVE, NOT BINDING ON THE COURT, THERE IS NO CHEVRON DIFFERENCE WITH THAT. CUNNINGHAM AND DAVIS ARE NOT DISTINCT, THEY ARE COMPLEMENTARY AND SHOULD BE READ THAT WAY. THEY ARE SEPARATED IMPROPERLY, CUNNINGHAM IS A STUNNING HIM -- A STANDALONE DECISION AND IT PROTECTED CONSUMERS AS THE ELEVENTH CIRCUIT COURT OF APPEALS HAS.

I AM SORRY, THANK YOU.

>> I WILL GIVE YOU AN ADDITIONAL MINUTE OF REBUTTAL TIME AND IN ADDITION TO THE 41 SECONDS YOU HAVE.

>> THANK YOU, YOUR HONOR. OPPOSING COUNSEL, PLEASE PROCEED.

YOU NEED TO UNMUTE, SERVE.

>> I APOLOGIZE, MAY IT PLEASE THE COURT.

I REPRESENT GIBSON, THE ISSUE BEFORE THE COURT PLACES IN CONTRAST THE FAVORED MEANS OF DISPUTE RESOLUTION BUT ARBITRATION IS CONSIDERED BY FEDERAL ARBITRATION ACT WITH THE

MAGNUSON LOSS WARRANTY ACT WHICH IS UNDENIABLY A SUPERPROTECTION STATUTE.

THE ORDER ON APPEAL RESOLVED TWO ISSUES BUT THEY ARE INTERRELATED IN A WAY THAT MAKES THE CHALLENGE TO ONLY PART OF THEM. IT RESOLVED TWO ISSUES, WHETHER THE MAGNUSON LOSS WARRANTY ACT FROM ITS BINDING ARBITRATION AND WHETHER THE MAGNUSON LOSS WARRANTY ACT REQUIRED THE ARBITRATION AGREEMENT THE INCLUDED IN THE WRITTEN WARRANTY UNDER THE CYNICAL DOCUMENT.

THE REASON THESE CLAIMS ARE INTERTWINED IS THE CASES THAT DECIDED THEM HAVE INTERTWINED THE DETERMINATION WHETHER ARBITRATION IS PERMISSIBLE UNDER THE MAGNUSON LOSS ACT WITH THE FTC'S TOOLS CONTAINED IN THE BRIEF.

SIMPLY PUT, THE FTC ITSELF HAS SAID THAT IT CONSIDERS BINDING ARBITRATION TO BE AN ALTERNATIVE DISPUTE RESOLUTION MECHANISM OR INFORMAL DISPUTE RESOLUTION MECHANISM AS DESCRIBED IN THE STATUTE.

THAT IS WHAT THE FTC HAS SAID FOR THE DIXON CASE.

LOOKING AT THE DECISIONS THAT DECIDED THIS ISSUE CUNNINGHAM, THE REASON CUNNINGHAM IS UNIQUE AND DIFFERENT FROM THE CASE BEFORE THE COURT IS IN CUNNINGHAM YOU HAD A THIRD PARTY, A STRANGER TO THE TRANSACTION TRYING TO ENFORCE THE WARRANTY BETWEEN, TRYING TO ENFORCE THE ARBITRATION AGREEMENT BETWEEN THE SELLER AND THE BUYER AND THE COURT KNOWS THAT AND IN FACT IN THE CONCLUSION THE COURT SAYS FIRST THE PROPRIETY OF RONNIE SMITH AND THE CUNNINGHAMS AGREE THE SELLER AND THE BUYER AGREEMENT IS NOT BE FOR US SO THE COURT'S

ANALYSIS IN CUNNINGHAM FOCUSES ON WHY A THIRD PARTY SHOULD NOT BE ABLE TO ENFORCE AN ARBITRATION AGREEMENT THAT IT IS NOT PARTY TO AND THAT IS WHY IT TALKS ABOUT THE CONTENT OF THE WARRANTY, THE DECEPTIVE ISSUES AND ALL THE THINGS CUNNINGHAM ANALYZES INCLUDING WHETHER ARBITRATION IS AN INFORMAL DISPUTE MECHANISM.

>> WHETHER SOMEBODY HAS STANDING TO ASSERT AN ARBITRATION AGREEMENT AND ATTEMPT TO ENFORCE THAT STATUS REALLY HAS NOTHING TO DO WITH WHETHER OR NOT A BINDING ARBITRATION AGREEMENT IS AN INFORMAL SETTLEMENT AGREEMENT, WOULD YOU AGREE?

>> IT HAS NOTHING TO DO WITH WHETHER IT DISPUTE RECOGNITION MECHANISM OR A SETTLEMENT MECHANISM BUT THE CUNNINGHAM DECISION ESPECIALLY STATES THEY ARE NOT TALKING ABOUT WHETHER IT IS AGREEABLE AND ONE OF THE REASONS I BELIEVE THAT HAPPENED WAS FLORIDA SUBSCRIBES TO THE SINGLE DOCUMENT WHICH FOR YEARS SAID EVERYTHING SIGNED AT THE SAME TIME AS PART OF THE SAME TRANSACTION HAS TO BE CONSTRUED TOGETHER AND THE FIFTH DCA IN ITS DECISION LES KROL NOTED THAT IN A FOOTNOTE.

THE LES KROL DECISION SAYS WE DON'T NEED TO HAVE A SINGLE DOCUMENT WITH THE ARBITRATION AGREEMENT IN IT BECAUSE ARBITRATION IS NOT A DISPUTE RESOLUTION, BUT EVEN IF IT WAS BASED ON THE FOOTNOTE AND WHAT THE TRIAL COURT FOUND WHICH WHEN YOU SIGN 3 OR 4 AGREEMENTS AT THE SAME TIME AS PART OF THE SAME TRANSACTION THEY ARE CONSTRUED TOGETHER AND THAT WORKS WITH WARRANTY DEEDS AND MORTGAGES AND CAR DEALS AND A HOST OF CONTEXTS AWARE FOR

HUNDREDS OF YEARS THAT HAS BEEN THE LAW.

>> THE FTC DOESN'T VIEW IT THAT WAY.

I WASN'T ABLE, IT SEEMS THE NATURAL READING OF THREE AND FIVE IN THE REGULATION HAS TO DO WITH THE CONSUMER'S INTERACTION NOT REALLY REFERRING TO IF EVERYTHING BREAKS DOWN AND HOW DO I DO THAT, ARE THERE ANY CASES TO BACK THAT UP?

I WASN'T ABLE TO FIND THEM.

>> I'M NOT AWARE OF ANY.

IF YOU READ THE LIST IT IS CHRONOLOGICAL.

IF YOU START AT THE START OF THE LIST, FIND A PARTY WITH THE WARRANTY, IT IS LIMITED TO THE ORIGINAL PURCHASER.

AND THEN YOU TALK ABOUT THE PARTS AND CHARACTERISTICS OF WHAT IS COVERED AND THEN WITH A WORN TOWN WILL DO IN THE EVENT OF A DEFECT.

MY CLIENT WOULD NOT DO ANYTHING IN THE EVENT OF A DEFECT ARBITRATION, THEY WILL NOT FILE FOR ARBITRATION OVER A DEFECT, THAT PROVISION, THE COUNCIL SAID, SUPPORT HIS ARGUMENTS, A STATEMENT OF WHAT A WARRANTY OR WILL DO, THAT WILL NEVER APPLY. WHAT THE WARRANTOR WILL DO, ARE THEY GOING TO REPAIR, REPLACE, REPLACEMENT PARTS, ALL THOSE THINGS FALL IN LINE, WHERE THE WARRANTY COMMENCES, THESE ARE CHRONOLOGICAL AND YOU COME DOWN STEP-BY-STEP EXPLANATION OF WHAT THE CONSUMERS FOLLOW, WHO YOU HAVE TO CALL, WHERE YOU TAKE THE VEHICLE, WHAT TYPES OF INFORMATION YOU PROVIDE AND THE NEXT THING IS INFORMATION RESPECTING AVAILABILITY OF ANY INFORMAL DISPUTE SETTLEMENT MECHANISM ELECTED BY THE WARRANT OR IN COMPLIANCE WITH PART 703 OF THIS CHAPTER.

703 OF THAT CHAPTER IS IMPORTANT BECAUSE THE FTC PROHIBITS INFORMAL DISPUTE RESOLUTION PROCESS UNDER 703 FROM BEING BINDING SO IF YOU CAN'T HAVE BINDING ARBITRATION UNDER 703 BECAUSE OF WHAT THEY PRESCRIBE IT CAN'T BE BINDING, IT HAS TO BE AN EFFORT TO NEGOTIATE SOMETHING LIKE MEDIATION OR THE BETTER BUSINESS BUREAU AS A PROGRAM, THINGS LIKE THAT IT IS BINDING, DOESN'T APPLY. IT CAN'T FIT UNDER THAT CATEGORY AND ANY EXCLUSIONS OR LIMITATIONS, ARBITRATION IS NOT A RELIEF.

ARBITRATION IS A VENUE OR JURISDICTION WHERE THE DISPUTE WILL BE DECIDED.

IT IS NOT RELIEF, NOT A REMEDY. REMEDIES, AS LONG AS THE FLOOR IS CLEAR ON THIS TO BE MADE IN ARBITRATION THE ARBITRATION IS A SUBSTITUTE AND IN THIS INSTANCE NO INDICATION OF ANYTHING, ANY REMEDY FOR THE LOSSES, A CERTAIN RELIEF TO ARBITRATION THAT SUBSTANTIATES ANY REVIEW.

IT WOULD BE THE SAME REMEDIES.

THE ISSUE DAVIS LOOKS AT ANALYZES THE PROHIBITION ON ARBITRATION THAT WOULD ARISE IF ARBITRATION WAS THE INFORMAL DISPUTE RESOLUTION MECHANISM AND THAT IS WHY DAVIS INTER-PLAYS WITH CUNNINGHAM AND WHILE CUNNINGHAM AS INDICATED IN THE BRIEF COMES UP AS CAUTION AND THE REASON IT COMES UP AS CAUTION IS THE ENTIRE RATIONALE THAT ARBITRATION IS AN INFORMAL DISPUTE RESOLUTION, THE FTC'S RULES, WITH CHEVRON FACTORS, THE THREE REASONS DIFFERENCE WOULD BE GIVEN AND NONE OF THEM APPLIED.

THE ELEVENTH CIRCUIT IS CLEAR ON THAT ISSUE.

IF YOU TAKE THE LIST UNDER

SECOND 101.3, IT STATES
ARBITRATION IS PROHIBITED.
AS NOTED EARLIER, IS NOT A CATCH
ALL, ONLY CAN TERMS CONTAINED IN
703. ONE MUST BE IN THE WRITTEN
WARRANTY.

THAT IS A LIST, SIMPLY THESE
TERMS.

IF YOUR TERMS FALL OUTSIDE THIS
LIST, IT MEANS THE WRITTEN
WARRANTY AND BINDING ARBITRATION
WHEN YOU SUBSCRIBE TO THE FTC
POSITION, BINDING ARBITRATION
WITH DISPUTE SETTLEMENT IN THE
WARRANTY.

OTHER THAN CUNNINGHAM AND
LORRAINE, LORRAINE IS
INTERESTING, IF YOU LOOK AT THE
DECISION, THE PATRIOT
MANUFACTURING DECISION WHICH
SPELLS OUT HOW DAVIS, THE
PATRIOT JACKSON DECISION BY THE
ALABAMA SUPREME COURT EXPLAINS
EXACTLY WHY THE RATIONALE IS
GONE.

THE COURT IN LORRAINE SAID THE
DECISION WAS GIVEN THE NIGHT
BEFORE ORAL ARGUMENTS AND I
UNDERSTAND WHY, I ADOPT THAT IS
MY DISTANT.

IT WAS A 2-1 DECISION, ANALYZING
DAVIS IN MAKING THE ANALYSIS
WITH CHEVRON FACTORS COMES TO
THIS IN CONCLUSION, IS NOT AN
INFORMAL DISPUTE RESOLUTION BUT
IS A FORMAL FINAL BINDING METHOD
TO RESOLVE.

>> IS THERE A SINGLE CASE BY THE
SUPREME COURT CONCERNING FEDERAL
ARBITRATION ACT THAT WOULD
DESCRIBE BINDING ARBITRATION AS
INFORMAL DISPUTE SETTLEMENT
MECHANISM?

>> NOT THAT I AM AWARE OF.
THE UNITED STATES SUPREME COURT
HAS TAKEN THE OPPOSITE APPROACH,
EVERY DECISION IN THE LAST 25-30
YEARS REGARDING ARBITRATION
TALKS ABOUT A SUBSTITUTE, NOT
INTENDED TO BE A PREREQUISITE,

NOT INTENDED, TO BE FOLLOWED
FIRST AND IF YOU LOOK AT THE 15
USC 2302 SECTION, NUMBER 8 TALKS
ABOUT THE FTC DESCRIBING RULES
ABOUT THE AVAILABILITY OF
INFORMAL DISPUTE SETTLEMENT
PROCEDURES OFFERED BY THE
WARRANTOR AND THE RECITAL WHERE
THE WARRANTY SO PROVIDES THAT
THE PURCHASER MAY BE REQUIRED TO
SUCH PROCEDURE BEFORE PURSUING
THE REMEDIES IN COURT.

THE STATUTE OF DELEGATES THE
AUTHORITY THE FTC HAS DRAWN A
BRIGHT LINE DISTINCTION BETWEEN
INFORMAL DISPUTE RESOLUTION
MECHANISMS HAVE TO BE DONE
BEFORE YOU GO TO COURT.

ARBITRATION IS A SUBSTITUTE FOR
COURT, BEFORE YOU GO TO COURT
FOR ARBITRATION.

AND EXECUTED A BINDING
ARBITRATION AGREEMENT REQUIRED
THE ARBITRATION, WHEN YOU GET TO
THE CONSUMER PROTECTION
STANDPOINT, IT IS THE BEST
METHOD TO ADVISE THE CONSUMER
THEY HAVE TO DO IT ARBITRATION
CLAIM.

OF THE ARBITRATION PROVISION WAS
TUCKED AWAY, THE NEW CAR
WARRANTIES, IT IS SOMETHING
ELSE.

BY PLACING THE ARBITRATION
AGREEMENT AND THAT WARRANTY YOU
HAVE GIVEN THE CONSUMER MORE
INFORMATION, THAT DEFIES LOGIC.
A SEPARATE STANDALONE AGREEMENT
FOR ARBITRATION HAVING IT BE
PART OF WHAT CREATES THE
TRANSACTION.

THOSE SITUATIONS CALL ATTENTION
TO THE FACT THEY ARE AGREEING TO
ARBITRATION.

WITH UNCONSCIONABILITY FOR THE
CONTEXT, IT IS VARIED SOMEPLACE.
CAN'T IMAGINE THE CONSUMER IS
BETTER OFF TUCKED INSIDE OF IT.
THE DOCUMENT THEY ARE SIGNING TO
CONSUMMATE THE TRANSACTION THAT

TELLS THEM WHAT THEY HAVE TO DO
WHEN ARBITRATION ARISES TO
PROCEED.

IF YOU WANT TO HAVE A MEDIATION
PROCESS THAT IS SEPARATE.
I AGREE UNDER FTC RULES THAT
NEEDS TO BE INCLUDED IN THE
WARRANTY IF IT IS A PREREQUISITE
TO GO TO COURT.

IF YOU HAVE A SUGGESTION YOUR
WARRANTY TO GO TO THE BETTER
BUSINESS BUREAU WITH A
PREREQUISITE UNDER THE 700.3
FACTORS THAT WOULD NOT BE
REQUIRED FOR THAT WARRANTY
BECAUSE IT IS NOT A PREREQUISITE
TO GO TO COURT.

THE OTHER FACTOR I MENTIONED
EARLIER BUT WANT TO FOCUS
ATTENTION ON THAT WAS NOT
ADDRESSED IN THE BRIEF WAS THE
ISSUE OF A SINGLE DOCUMENT, THAT
IS KEY BECAUSE UNDER FLORIDA
LAW, CREATES A FRAMEWORK,
ENFORCEMENT OF STATE WARRANTY
CLAIMS IN STATE LAWS GOVERN A
LARGE PORTION OF WHAT APPLIES,
THE REMEDIES ARE CREATED OTHER
THAN ATTORNEYS FEES, IN FACT
THEY HAVE JURISDICTION BELOW A
CERTAIN THRESHOLD SO THESE
CASES, UNLESS YOU ARE TALKING
ABOUT A 300,\$000 VEHICLE --

>> YOU ARE NOT SUGGESTING IF IT
CAME DOWN TO THAT, WE WOULD BE
INTERPRETING THE PHRASE SINGLE
DOCUMENT AND READILY UNDERSTOOD
LANGUAGE, THE MEANING OF THAT
PHRASE IS USED IN THE FTC RULE.
THAT HAD NOTHING TO DO WITH
THAT.

>> THAT IS THE WAY THE FTC WOULD
DO IT.
STATE LAW.

>> ARE YOU TELLING ME THE FTC,
ETA DOCUMENTS CAN BE A SINGLE
DOCUMENT?

>> WITHOUT DIRECTION FROM THE
FTC YOU COULD LOOK AT STATE LAW

--

>> IS THERE DIRECTION?
>> THE REGULATION IS UNCLEAR.
IT SAYS --
>> SINGLE DOCUMENT, IF THIS CASE
CAME DOWN, GO AHEAD.
>> TURNING TO THE CONCLUSION
THAT WAS REACHED IN THE LES KROL
CASE, THE COURT DID THE
ANALYSIS, MADE THE ASSESSMENT
AND DETERMINED DOCUMENT WILL
DOES NOT REQUIRE THE ARBITRATION
CONDITION TO BE CONTAINED IN THE
WARRANTY TO BE ENFORCEABLE AFTER
CONDUCTING ALL OF THE ANALYSIS
THE COURT PROPERLY CONCLUDED IF
THERE ARE NO FURTHER QUESTIONS I
YIELD THE REMAINDER OF MY TIME.
>> WE THANK YOU, COUNSEL,
REBUTTAL.
>> ONE QUICK POINT.
OPPOSING COUNSEL SAYS THERE IS
NO REQUIREMENT OF SINGLE
DOCUMENT RULE THAT EVERYTHING BE
IN.
2302 AUTHORIZES THE FTC TO
EXCLUDE CERTAIN THINGS FROM A
SINGLE DOCUMENT, THEY HAVEN'T
DONE SO.
THERE IS NO CASE HOLDING THE
SIGNAL DOCUMENT RULE IS BROADLY
CRAFTED SO YOU COULD LEAVE
THINGS OUT.
THAT'S NOT WHAT ANY CASE EVEN
THOSE AGAINST ME HAVE HELD.
EVEN THE CASES THAT GO AGAINST
ME TALK ABOUT EVERYTHING MUST BE
IN A SINGLE DOCUMENT BUT
CARVEOUT REASON, MISINTERPRETS
CUNNINGHAM.
FEDERAL LAW SUPERVISION --
SUPERSEDES STATE LAW THAT THE
FTC CRAFTED A DOCUMENT RULE THAT
IS VALID, IT OVERRULED STATE LAW
AND GOOD REASON IT SHOULD BE, IN
THIS CASE, THAT EXAMPLE.
HE MY CLIENT SITES RETAIL
INSTALLMENT CONTRACT THAT SAYS
THIS CONTRACT CONTAINS THE
ENTIRE AGREEMENT BUT THAT WAS
FALSE.

HE SIGNED A BUYERS ORDER THAT SAYS THIS VEHICLE WAS SOLD AS IS WITH FAULT WITHOUT ANY WARRANTY AND DEALER EXPRESSLY DISCLAIMS ALL WARRANTIES EITHER EXPRESS OR IMPLIED BUT WE KNOW THAT IS FALSE, ISSUED A WARRANTY.

THE WINDOW STORM CONTAINED A WARRANTY BUT DIDN'T DESCRIBE THE TERMS OF IT AND WHAT HASN'T BEEN MENTIONED, CHRYSLER IS NO LONGER IN THIS, THE DEALER ALSO SOLD MY CLIENT A SERVICE CONTRACT WHICH IS A TYPE OF FOREIGN TO YOU IN A DIFFERENT CATEGORY.

MY CLIENT EXECUTED A LOT OF THINGS WITH CONFLICTING INFORMATION, THE BEST WAY FOR HIM TO KNOW HE WAS REQUIRED TO GO TO BINDING ARBITRATION IS TO PUT IT IN A SINGLE DOCUMENT OF THE WARRANTY AND THAT IS WHAT THE FTC REQUIRES.

>> THANK YOU BOTH FOR YOUR ARGUMENTS AND WE WILL NOW PREPARE TO MOVE TO THE NEXT CASE ON OUR DOCKET.