SUPREME COURT OF FLORIDA
CASE NO. SC05-1907
L.T. CASE NO. 2D04-2719

AMERICAN HONDA MOTOR COMPANY, INC.,

Petitioner,

v.

JENNIFER CERASANI

Respondent.

INITIAL BRIEF OF PETITIONER, AMERICAN HONDA MOTOR COMPANY, INC.

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STATEMENT OF CASE AND FACTS

This case is before the Court on a certified conflict with the First District's decision in Sellers v. Frank Griffin AMC Jeep, Inc., 526 So. 2d 147 (Fla. 1st DCA 1988). The issue is whether a lessee can bring an action under the Magnuson-Moss Warranty – Federal Trade Commission Improvement Act, 15 U.S.C. §2301, et seq., ("Magnuson-Moss Act" or "the Act"). In Sellers, the First District found that the Magnuson-Moss Act applies to goods initially sold to a buyer and does not apply to an automobile that has simply been leased. 526 So. 2d at 156. In this case, the Second District found that the Plaintiff/Lessee Jennifer Cerasani pled sufficient facts to demonstrate that, even though she was a lessee, she was entitled to pursue a Magnuson-Moss Act claim. American Honda Motor Company ("Honda") petitions this Court to reinstate the trial court's decision, approve Sellers, and reverse the decision below.

Cerasani leased a new Honda Civic manufactured by Honda. R. 1:86 at Ex. A; Pet. App. 3 ("the Lease")[1]. Although the lease designates Crown Honda as the lessor and Cerasani as the lessee, Cerasani asserts that Crown Honda sold the vehicle to a leasing institution, "Honda Leasing,"[2] which in turn leased the vehicle

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[1] References to the record on appeal will be in the form "R. [volume]: [page]." References to Petitioner's appendix will be in the form "Pet. App. [tab]" or "Pet. App. [tab]:[page]."

[2] Honda places the name "Honda Leasing" in quotes because Honda is unaware of any entity by that name.

to her. R. 1:86 at ¶¶ 3, 5-7, Ex. A, at 1; Pet. App. 2. The vehicle was covered by Honda's standard New Vehicle Warranty and the Lease assigned all rights in the warranty to Cerasani. R. 1:86 at Ex. A; Pet. App. 4.

During the course of the lease, Cerasani took the vehicle to an authorized Honda dealership for repairs. R. 1:86 at ¶¶ 14-15. She complained that the steering and suspension rattled and squeaked, the steering wheel was off-center and vibrated, the speakers had static, a door panel was noisy, and a trunk latch was broken. Id. ¶ 18. Honda honored the warranty and attempted to fix the vehicle, but Cerasani was dissatisfied with the repairs. Id. ¶¶ 17-18.

Cerasani sued Honda for breach of written warranty and implied warranty under the Magnuson Moss Act claiming that she suffered aggravation and inconvenience and loss of use of the vehicle for several days during the repairs. R. 1:86 ¶¶ 23-24. Further, Cerasani asserted that she ultimately "sold" the leased vehicle to mitigate her damages. Id. ¶ 25. As damages, she sought the return of all payments she made toward the lease, diminution in value, and attorney's fees. R. 1:86 at ¶¶ 18, 25, 27-37, 46.

Honda moved to dismiss, asserting that a lessee could not state a claim under the Magnuson-Moss Act because the Act applies to sold goods, not leased goods. R. 1:33, 135. The trial court determined that, as a matter of law, the Act's

protections for written warranties do not apply to leased vehicles and therefore granted Honda's motion.[3] R. 2:235-36.

The Second District reversed the dismissal of Cerasani's written warranty Magnuson-Moss Act claim, holding that the Act applies to her claim under two theories. First, the court held that because Cerasani alleged that prior to her lease, the dealership, Crown Honda, sold the vehicle to "Honda Leasing" who then leased the vehicle to Plaintiff, this constituted a sale for purposes of the Act. Furthermore, the court held that regardless of whether such a sale occurred, the allegation that Cerasani was able to enforce that warranty by taking the vehicle to the dealership for repairs was sufficient to create a cause of action under the Act. In reaching this result, the Second District certified conflict with the First District's decision in Sellers v. Frank Griffin AMC Jeep, Inc., 526 So. 2d 147 (Fla. 1st DCA 1988), to the extent Sellers concluded that the Act does not apply to lease transactions. This proceeding follows.

[3] Honda also argued, and the trial court agreed, that Cerasani had no implied warranty claim because no privity existed between her and Honda. R2:236-37. The Second District affirmed that point, which is not before this Court.

SUMMARY OF THE ARGUMENT

The Magnuson-Moss Warranty Act creates a limited remedy to enforce specific types of warranties in specific circumstances. The First District's decision in Sellers v. Frank Griffin AMC Jeep, Inc., 526 So. 2d 147 (Fla. 1st DCA 1988), correctly interpreted the Act to apply to goods covered by a written warranty only where those goods have first been sold at retail. That decision was consistent with the Act's text and purpose of permitting purchasers of consumer products to enforce manufacturers' warranties and related service agreements.

The decision below, on the other hand, departs from the Act's text and purpose. The Second District applied the Act to a leased vehicle. More specifically, the Second District held that a sale between a dealership and a financing company satisfies the Act's definition of a "written warranty" made "in connection with the sale," even though that sale did not trigger Honda's New Vehicle Warranty. The Second District further held that anyone who has obtained a repair pursuant to the New Vehicle Warranty is a consumer under the Act and on that basis alone can bring a claim.

Such interpretations are entirely unmoored from the Act Congress adopted. The Act's plain language, supported by its legislative history, confirms that the Act applies only to sold goods, not leased goods, that sales require warranties to have

been made in return for the sale, and that lessees may not use the Act to enforce warranties that do not qualify as "written warranties" under the Act.

This Court should approve Sellers and reverse the decision below. Lessees such as Cerasani should avail themselves of remedies, such as Florida's Lemon Law, that were created to enforce warranties for leased items. See generally § 681.104, Fla. Stat. The Act does not apply to the automobile she leased.

STANDARD OF REVIEW

Statutory interpretation is a question of law subject to de novo review by this Court. Daniels v. Florida Dep't of Health, 898 So. 2d 61, 64 (Fla. 2005). Likewise, the interpretation of a legal agreement, such as a lease, is also a question of law that is reviewed de novo. D'Angelo v. Fitzmaurice, 863 So. 2d 311, 314 (Fla.2003) (holding de novo review applies to pure questions of law); USA Indep. Mobilehome Sales, Inc. v. City of Lake City, 908 So. 2d 1151, 1154 (Fla. 1st DCA 2005) (holding interpretation of contract is pure question of law reviewed de novo).

ARGUMENT

I. THE SECOND DISTRICT ERRED IN CONCLUDING, CONTRARY TO SELLERS, THAT THE MAGNUSON-MOSS ACT APPLIES TO LEASED GOODS.

Honda argued below that the Magnuson-Moss Act does not apply to leased goods, including automobiles and the trial court agreed. The First District's

decision in Sellers v. Frank Griffin AMC Jeep, Inc., 526 So. 2d 147 (Fla. 1st DCA 1988), directly supports this conclusion, but the Second District held that the Act applies to Cerasani's leased vehicle. On the most basic level, the Second District erred because the Act simply does not apply to leased goods.[4]

The starting point for interpreting a statute is the text of the statute. Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 450 (2002); see also Florida Dep't of Revenue v. New Sea Escape Cruises, Ltd., 894 So. 2d 594, 957 (Fla. 2005). The first step "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." Barnhart, 534 U.S. at 450 (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997)). The inquiry ceases "if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.' Id. Only where a statute's text does not have a plain and unambiguous meaning may a court turn to the statute's legislative history for assistance in determining the congressional intent behind an act. See Connecticut Nat'l Bank v. Germain, 503 U.S 249, 253-54 (1992); Burlington Northern R. Co. v. Oklahoma Tax Comm'n, 481 U.S. 454, 461 (1987).

[4] The Second District recently reached the same erroneous conclusion in two other cases, as did the Third District in another case. See Brophy v. DaimlerChrysler Corp., Case No. 2D04-1466 (Fla. 2d DCA Oct. 21, 2005); O'Connor v. BMW of N. Am., LLC, 905 So. 2d 235 (Fla. 2d DCA 2005); Mesa v. BMW of N. Am., LLC, 904 So. 2d 450 (Fla. 3d DCA 2005).

Here, the plain and unambiguous language of the statute supports the conclusion that the Act does not apply to a lease transaction. But even if the Court goes beyond the statute to look at legislative history, the conclusion is the same. The Magnuson-Moss Act only applies to goods that are sold.

A. THE PLAIN MEANING OF THE ACT'S TEXT IS THAT IT APPLIES ONLY TO SOLD GOODS.

1. The Elements of a Magnuson Moss Claim

15 U.S.C. section 2310(d)(1) sets forth the private remedies available under the Magnuson-Moss Act and defines the cause of action on which Cerasani purports to base her claim:

> [A] consumer who 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, may bring suit for damages and other legal and equitable relief . . . .

15 U.S.C. § 2310(d)(1) (emphasis added). As this provision demonstrates, a claim under the Act must satisfy three principal elements, each of which is defined by the Act. First, the plaintiff must be a consumer. Second, the defendant must be a supplier, warrantor, or service contractor. Third, the defendant must have failed to comply with the obligations set forth by the Act or by a written warranty, implied warranty, or service contract. Each of these terms is specifically defined by the Act -- thus, in the House Report accompanying the Act, Congress stressed that the specific definitions of terms included in 15 U.S.C. section 2301 "are important to

understanding [the Act]." H.R. REP. NO. 93-1107 (1974), reprinted in 1974 U.S.C.C.A.N. 7702, 7716.

Only the first and third elements are relevant to the issues in this case.

Consumer: The Act defines three categories of "consumers." They are:

> [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, and [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) (numbering added). The three types of consumers identified in this definition are commonly referred to in the case law as category one, category two, and category three consumers.

A category one consumer is a purchaser of consumer goods other than for purposes of resale. There is no longer a dispute in this case that Cerasani was not a buyer and thus is not a category one consumer. Cerasani argues, and the Second District agreed, that she is a category two and a category three consumer.

A category two consumer is a person to whom the goods are transferred while the warranty is in effect. Thus, for example, a person who buys or otherwise obtains a used car while its warranty is still in effect is a category two consumer. A manufacturer's five-year warranty on a consumer good is still enforceable by a

second-hand buyer if the original purchaser sells the item in less than the five-year period. Subsequent owners are category two consumers.

A category three consumer is a person authorized by the terms of a written warranty or service contract or under state law to enforce the warranty or service contract. Thus, if a written warranty or service contract expressly indicates that it may be enforced by anyone in possession of a consumer good, then the person in possession would be a category three consumer. Also, under Florida's version of the Uniform Commercial Code, the legislature expressly made warranties for sold goods enforceable by an array of persons in addition to the purchaser. § 672.318, Fla. Stat.[5] Persons who come within this broad provision with respect to a written warranty would be category three consumers under the Magnuson-Moss Act because they are authorized by state law to enforce the warranty.

Cerasani argued below that the Act's three-pronged definition of "consumer" must have been intended to apply to different categories of persons and thus it had to contemplate more than a buyer as set forth in category one. That

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[5] That statute provides:

> A seller's warranty whether express or implied extends to any natural person who is in the family or household of his or her buyer, who is a guest in his or her home or who is an employee, servant or agent of his or her buyer if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty.

§ 672.318, Fla. Stat.

is correct, but as set forth above, each category of consumer does encompass different persons.

Written Warranty, Implied Warranty, and Service Contract: As to the third element, the Act defines a "written warranty," an "implied warranty," and a "service contract." Only the term "written warranty" is at issue here.

In the context of the Magnuson-Moss Act, "written warranty" is a term of art with a precise meaning that differs from the lay notion of a warranty. A "written warranty" is defined by the Act as:

> (A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or
>
> (B) any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking,
>
> which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.

15 U.S.C. § 2301(6) (emphasis added). As the Act's text makes clear, the final clause applies to both subsections (A) and (B) and confirms that, for a written document to qualify as a "written warranty," the specific product must have been

sold by a supplier to a buyer (a term not defined in the Act) and the warranty must have been part of the basis of the bargain between those two persons.

2. Under These Definitions, The Act Applies To Written Warranties Covering Sold Goods, Not Leased Goods

The Act's definitions for "consumer" and "written warranty" confirm that, with respect to written warranties, the Act applies only to consumer goods that are first sold to a buyer for purposes other than resale and where a written affirmation, promise, or undertaking is part of the basis of that sale. Other conditions apply as well, as will be discussed later, but these three requirements are fundamental to all private claims involving written warranties.

It necessarily follows, then, that the Magnuson-Moss Act does not cover any promise, affirmation, or undertaking made in connection with only leased goods. Leased goods are, by definition, not sold. Where no initial sale has occurred in which a qualifying warranty was part of the basis of the bargain, no written warranty exists as the Act defines that term.

That the Act applies only in the case of sold goods, not leased goods, has been well supported by case law -- at least until the last few years. One of the earliest Magnuson-Moss Act cases involving leased automobiles was the First District's decision in Sellers. There, a plaintiff leased her vehicle from a dealer and, subsequently, the dealer assigned its interests in the lease to a third party. The plaintiff later sued under Florida's version of Article 2 of the Uniform Commercial

Code ("UCC"), which governs sales, and under the Magnuson-Moss Act, attempting to revoke her acceptance of the vehicle based on what she asserted were defects in the car. The plaintiff argued that her lease should be construed as a sale, but the trial court granted the defendant's motion for summary judgment, holding that both Article 2 and the Act apply only in the context of sales, not leases.

The First District affirmed. Sellers, 526 So. 2d at 150-51, 156. The court concluded that the plaintiff's lease could not be characterized as a sale under the UCC or the Magnuson-Moss Act because it bore the characteristics of a lease, not a sale. Id. at 150-51, 156. The First District also rejected the plaintiff's additional argument that, even if her lease transaction could not be treated as a sale, she nonetheless qualified as a category three consumer who could bring a claim under the Act. On this issue, the court held that the Act requires "an initial sale to a buyer in which warranties are made by the seller, and as such, it does not apply to a pure lease of automobiles or other consumer goods unless the lease bears a significant relationship to an actual purchase and sale." Id. at 156. The court determined that no such sale had taken place, and therefore the plaintiff had no claim under the Magnuson-Moss Act. The court added that, while a case could be made for applying the Act to lease transactions, such would amount to "judicial legislation" and was therefore "a matter for legislative decision." Id.

In the decades following the Act's adoption, numerous courts correctly held that the Act applied only to goods that were sold, not goods that were leased. See, e.g., DiCintio v. DaimlerChrysler Corp., 768 N.E.2d 1121, 1125 (N.Y. 2002); D.L. Lee & Sons, Inc. v. ADT Sec. Sys., Mid-South, Inc., 916 F. Supp. 1571, 1580-82 (S.D. Ga. 1995); Alpiser v. Eagle Pontiac-GMC-Isuzu, Inc., 389 S.E.2d 293, 295 (N.C. Ct. App. 1990); Corral v. Rollins Protective Services Co., 240 Kan. 678, 732 P.2d 1260, 1267 (1987).

Likewise, numerous treatises have concluded that the Act applies only in the case of sales and not to leased goods. See, e.g., Milton R. Schroeder, Private Actions Under the Magnuson-Moss Warranty Act, 66 Cal. L. Rev. 1, 11 (1978) ("The definitions of written and implied warranties still require a sale between a supplier and a buyer. Thus, this portion of the definition of 'consumer' must be viewed as referring to transferees after an initial sale of the product. There must be an initial buyer who buys 'for purposes other than resale' of the product."); Paul A. Lester, The Warranty Act: The Courts Begin to Talk, 16 UCC L.J. 119, 127 (1983) (noting that the Act "applies only to written warranties offered in conjunction with the sale of consumer products and does not cover lease, bailment, or other transactions involving consumer products"); Clark and Smith, The Law of Product Warranties, ¶ 15.08 [1986 Supp.], quoted with approval in Corral v. Rollins Protective Servs. Co., 732 P.2d 1260, 1267 (Kan. 1987) ("[T]he Act does not apply

to leases of consumer products since a 'written warranty' under the Act only arises in connection with the 'sale' of a consumer product . . . Thus, the Act literally covers only warranties on a consumer product "sold" to a consumer.").

B. THE ACT'S LEGISLATIVE HISTORY SHOWS THE ACT APPLIES ONLY TO SOLD GOODS.

As discussed above, the Act's text is clear and unambiguous and thus there is no need to look to legislative history to interpret the Act. But even if the Court were to do so, as explained below, that history simply confirms that the Act was intended to apply to sold goods and not leased goods. Congress rejected specific efforts to expand the Act to include leases and was well aware of the prevalence of automobile leases at the time of the Act's adoption. Also, the Act's definitions of "consumer" and "written warranty" were crafted to be consistent with the relaxed privity requirements states had adopted for warranty enforcement under the UCC chapter on sales of goods and to ensure that the Act is triggered by such sales. Finally, unlike states such as Florida that have amended their Lemon Laws to include remedies for automobile leases where manufacturers' warranties are not honored, Congress has never amended the Magnuson-Moss Act to include leases, despite decades of jurisprudence holding the Act inapplicable to them.

The Magnuson-Moss Act was prompted by congressional examination into the warranties manufacturers issued for an array of consumer products. The Act expressly reflects Congress's intent "to improve the adequacy of information

available to consumers, prevent deception, and improve competition in the marketing of consumer products . . . ." 15 U.S.C. § 2302(a).

During early hearings on the Act's proposed text, the draft legislation was heavily criticized because it mentioned buyers but not lessees. One critic, a professor at the University of Pennsylvania speaking on behalf of the Public Interest Research Group, explained that automobile leasing in particular had become extensive in the marketplace and that lessees as well as buyers should be able to avail themselves of the Act. His proposed changes to the draft legislation would have defined "consumers" to include buyers and lessees and otherwise expanded the Act to include leased goods. See Consumer Warranty Protection--1973: Hearings on H.R. 20 and H.R. 5021 Before the Subcomm. on Commerce and Finance of the Comm. on Interstate and Foreign Commerce, 93d Cong, at 95 [1973] [statement of Professor Fairfax Leary]; see also Consumer Warranty Protection: Hearings on H.R. 6313, H.R. 6314, H.R. 261, H.R. 4809, H.R. 5037, H.R. 10673 [and similar and identical bills] Before the Subcomm. on Commerce and Finance of the Committee on Interstate and Foreign Commerce, 92d Cong, at 119 [1971] [statement of Professor Fairfax Leary]. The Act passed in 1975 without any of those changes being implemented, see Pub. L. 93-637, title I, § 101, Jan. 4, 1975, 88 Stat. 2183, which supports the Act's plain meaning that it does not apply to leases.

When the Magnuson-Moss Act was adopted, Congress was well aware of the prevalence of leasing goods, including automobiles. Seven years prior to adopting the Act, Congress adopted the consumer-oriented Truth In Lending Act ("TILA"), which specifically defined "consumer leases" covered by that act as well who qualified as "lessees" and "lessors." 15 U.S.C. § 1667(1)-(3). TILA also included a finding that there had been "a recent trend toward leasing automobiles and other durable goods for consumer use as an alternative to installment credit sales . . . ." 15 U.S.C. § 1601(b). TILA's recognition of prevalent leasing practices in the context of an act on consumer lending further demonstrates that Congress's focus on sales in the Magnuson-Moss Act, and the Act's failure to mention leases, were intended to omit leases from the Act's scope.

Furthermore, the Act's history and text shows that Congress intended to make the class of "consumers" who could sue under the Act consistent with the class of persons who could sue for breach of warranty under the UCC's chapter on sales of goods. Florida's version of the UCC, for instance, allows persons in addition to purchasers to sue for breach of warranty, see § 672.318, Fla. Stat., but nothing in section 672.318 allows breach of warranty suits to be brought where a good was not sold. Expanding the class of persons who can sue in the context of a sold good, however, is entirely distinct from expanding the Act to encompass goods that have not been sold.

The Act's legislative history also shows that Congress intentionally crafted the Act's definition of "written warranty" to be less broad than the warranties covered by Article 2 of the UCC. The definition of "written warranty" ultimately adopted in the Act did not include oral warranties and it restricted eligible written warranties to narrow classes of assurances made as part of the consideration for the first retail purchase. As the Committee on Interstate and Foreign Commerce specifically explained, the "written affirmation, promise, or undertaking must become part of the basis of the bargain between a supplier and the first consumer purchaser." H.R. Rep. No. 93-1107, 93rd Cong., 2d Sess [reprinted in 1974 U.S.C.C.A.N. 7702, 7717] (emphasis added).

In addition, that Congress would craft the Act to apply to sales but not leases is supported by common-sense distinctions between sales and leases. In the sale of a consumer good, the item leaves the manufacturer's distribution chain and rests permanently in the hands of the ultimate consumer. Other than reputation concerns, the manufacturer may have little incentive to undergo the expense necessary to conform the item in accordance with the manufacturer's warranty. If a vehicle is a lemon, so to speak, the consumer has purchased that lemon and is stuck with it. On the other hand, goods leased from the manufacturer, or from those in the manufacturer's chain of distribution, are paid for not on the basis of a purchase price but based on the cost of using a leased item over the course of the

lease. Those leased goods will ultimately be returned to the manufacturer, giving the manufacturer significant additional incentives to correct and repair the item at the earliest opportunity. A lessee who leases a lemon is not, in the end stuck with the lemon -- the manufacturer is.

Finally, it bears mention that while numerous cases and treatises have for decades interpreted the Act not to apply to leases, Congress has never expanded the Act to include leases. By comparison, when Florida adopted its Lemon Law, that law did not apply to leased automobiles, but the Florida legislature quickly amended that law to apply specifically to leased automobiles. Compare § 681.102 et seq., Fla. Stat. (1983) with § 681.102 et seq., Fla. Stat. (Supp. 1986). The revisions included provisions directed specifically to lessees, who have not purchased the vehicle but instead have only agreed to pay for its use over a period of time. See § 681.102, -.104, Fla. Stat. (Supp. 1986). Congress's inaction in the face of nearly 20 years of decisions holding that the Act does not apply to leases is indicative that the interpretation of the Act long followed by courts and commentators is correct.

Accordingly, the Act's legislative history fully supports the common-sense notion that the Act applies, and was intended to apply, to sold goods and not leased goods, much like Article 2 of the UCC. Congress was aware of the prevalence of leases, including automobile leases, but affirmatively chose not to include them

within the Act. As such, the Act's text and its history demonstrate that, as Sellers held, the Act applies only to goods that are sold and not to written warranties given in connection with goods that are merely leased. The Court should approve the decision in Sellers and reverse the decision below. See also DiCintio, 768 N.E.2d at 1124-26 (examining the Act's legislative history and concluding the Act does not apply to leased goods).

II. THE SECOND DISTRICT'S HOLDINGS THAT CERASANI QUALIFIES AS A CATEGORY TWO AND CATEGORY THREE CONSUMER ARE CONTRARY TO THE ACT'S SALE REQUIREMENT, AS CONFIRMED IN SELLERS.

Ignoring the Act's plain language, as confirmed in Sellers, which clearly demonstrates that the Act does not apply to lessees, the Second District affirmatively held that Cerasani's allegations qualified her as both a category two consumer and a category three consumer and that, as such, she could bring a Magnuson-Moss Act claim against Honda. Both holdings misinterpret the Act's fundamental sale requirement and conflict with the First District's decision in Sellers. The decision below should be reversed and the decision in Sellers should be approved.

A. CERASANI HAS NO CLAIM AS A CATEGORY TWO CONSUMER.

A category two consumer is a person to whom a consumer good is transferred "during the duration of" a written warranty, implied warranty, or

service contract. 15 U.S.C. § 2301(3). A written warranty is, in short, an affirmation or undertaking in connection with the sale of a good that is part of the basis of the bargain between the buyer and seller. 15 U.S.C. §2301(6). The Second District appeared to recognize that the "written warranty" definition requires a sale, but the court held that the alleged pre-lease sale between Crown Honda and "Honda Leasing" satisfied this requirement.

In so holding, the court erred. A purported sale by the dealer to "Honda Leasing" would not have triggered Honda's New Vehicle Warranty and therefore was neither made "in connection with the sale" nor was it part of the basis of the bargain between buyer and seller. Also, even if the alleged pre-lease sale could satisfy the statute's definitions, Cerasani's allegations of a pre-lease sale and a transfer "during the duration" of a written warranty were conclusively disproved by the Lease and the New Vehicle Warranty, which Cerasani attached to her complaint. For each of these reasons, Cerasani cannot bring a claim against Honda as a category two consumer under the Act.

1. The Pre-Lease Sale Cerasani Alleges Was Not An Initial Sale To A Buyer In Which Warranties Were Made By The Seller.

The Act's definition of "written warranty" makes clear that the only written warranties covered by the Act are those regarding goods for purposes other than resale, for which a warranty was made in connection with the sale, and where the

warranty was part of the basis of that bargain. Thus, in Sellers, the First District properly concluded that the Act's protections are triggered by "an initial sale to a buyer in which warranties are made by the seller." 526 So. 2d at 156. Assuming that there was a pre-lease "sale" by a dealership to a financing company in this case, it was not a sale that triggered Honda's New Vehicle Warranty. Therefore, the warranty was not made in connection with the sale and was not part of the basis of the alleged bargain. Thus, no "written warranty" exists and Cesarani claim as a category two consumer fails.

Honda's warranty, which Cerasani attached to her complaint, specifically provides for three instances that trigger its coverage:

> This warranty begins on the date the vehicle is put into use in one of the following ways:
>
> - The vehicle is delivered to the first purchaser by a Honda dealer.
> - The vehicle is leased.
> - The vehicle is used as a demonstrator or company vehicle.

R. 1:86 Ex. B, at 12; Pet. App. 5:18 (emphasis added). Cerasani has never alleged, nor could she, that any of these circumstances has occurred -- there was no delivery of the vehicle to "Honda Leasing," "Honda Leasing" did not lease the vehicle, and the vehicle was not used as a demonstrator or company vehicle.

Thus, even assuming that, as Cerasani alleges, "Honda Leasing" purchased the vehicle prior to the lease, that supposed sale does not satisfy the Act's

requirement of "an initial sale to a buyer in which warranties are made by the seller." Sellers. If the sale to "Honda Leasing" did not trigger the New Vehicle Warranty's coverage, then that warranty could not have been part of the basis of the alleged bargain between Crown Honda and "Honda Leasing."

While Cerasani may point to other cases in which courts have held that an alleged pre-lease sale to a financing institution brings a vehicle's warranty within the Act, those cases do not discuss whether the sale triggered the warranty and appear to presume it did. Brophy; O'Connor; Mesa; Peterson v. Volkswagen, Inc., 679 N.W.2d 840 (Wisc. Ct. App. 2004), Szubski v. Mercedes-Benz, U.S.A., L.L.C., 796 N.E.2d 81 (Ohio Ct. Com. Pleas 2003), and Cohen v. AM General Corp., 264 F. Supp. 2d 616 (N.D. Ill. 2003). In this case, the alleged sale did not trigger Honda's New Vehicle Warranty. Cerasani thus cannot bring suit against Honda as a category two consumer attempting to enforce a "written warranty."

2. The Lease Confirms No Pre-Lease Sale Occurred and The New Vehicle Warranty Confirms No Transfer Occurred "During The Duration Of" A Written Warranty.

Even if a pre-lease sale to a financing company could have triggered Honda's New Vehicle Warranty, Cerasani's pleading that a pre-lease sale occurred and that the vehicle was transferred to her "during the duration of" a written warranty cannot overcome the controlling language of the documents attached to the complaint, which show otherwise. Exactly as in Sellers, the Lease here

expressly sets forth that the dealership was the lessor and the plaintiff here was the lessee. There was, therefore, no pre-lease sale and Cerasani did not lease the vehicle from "Honda Leasing," notwithstanding her allegations to the contrary. Also, the New Vehicle Warranty confirms that Honda's warranty did not begin to run until Cerasani leased the vehicle, and therefore Cerasani did not receive the vehicle "during the duration of" the warranty. In either case, Cerasani cannot bring a claim as a category two consumer under the Act. 15 U.S.C. § 2301(3).

The Second District acknowledged that the lease shows Cerasani leased the vehicle from Crown Honda, but the court held that the Lease did not "conclusively" establish that fact. With due respect to the district court, Cerasani's simple allegation she leased the vehicle from "Honda Leasing" cannot trump the unambiguous language of the controlling legal document. Cerasani has not reformed the Lease's terms or even sought to reform the Lease, and so it remains the controlling legal document on this point. Pleading by Cerasani's counsel to recast this case in the mold of cases involving pre-lease sales to financing companies should fail in light of the unambiguous and dispositive terms of the lease attached to the complaint. See Hollywood Lakes Section Civic Ass'n v. City of Hollywood, 676 So. 2d 500, 501 (Fla. 4th DCA 1996); Franz Tractor Co. v. J.I. Case Co., 566 So. 2d 524, 526 (Fla. 2d DCA 1990); see also In re Estate of Mayers, 627 So. 2d 103 (Fla. 4th DCA 1993) (affirming dismissal on basis trial

court need not have accepted legal conclusion that document attached to complaint was a will). No sale took place here, and Cerasani has never suggested how she can allege she leased the vehicle from "Honda Leasing" when the written lease provides that the lessor was Crown Honda.

In addition, the Second District accepted Cerasani's bald allegation that she leased the vehicle "during the duration of" the New Vehicle Warranty. To be a category two consumer, the product must have been transferred to the person "during the duration of" a written or implied warranty. As demonstrated above, the New Vehicle Warranty attached to the complaint shows that it was not triggered until the time Cerasani leased the vehicle. The vehicle was therefore not transferred to her "during the duration of" that warranty. See Voelker v. Porsche Cars, Inc., 353 F.3d 516, 524 (7th Cir. 2003) (holding vehicle was not transferred during the duration of a written warranty because the warranty did not take effect until the plaintiff leased the vehicle). Cerasani has pled otherwise, but she has never even suggested how that could be the case, and the New Vehicle Warranty conclusively shows her allegation is incorrect.

In sum, the Second District erred in holding that sale Cerasani alleges met the Act's sale requirements because it not "an initial sale to a buyer in which warranties are made by the seller," as required by the Act and confirmed by Sellers. A pre-lease sale by a dealership to a financing company that involves no

warranty being made is not such a sale and cannot trigger the Act's protections, and thus the decision below as it relates to Cerasani's claim as a category two consumer should be reversed. The category two decision should also be reversed because, contrary to Cerasani's pleading, no pre-lease sale ever took place here and Honda's warranty did not begin to run until the vehicle was leased -- both of which foreclose the possibility that Cerasani can bring a Magnuson-Moss Act claim as a category two consumer.

B. CERASANI HAS NO CLAIM AS A CATEGORY THREE CONSUMER.

The Second District also held that Cerasani qualified as a category three consumer who could enforce Honda's New Vehicle Warranty based solely on the fact she received warranty service on her leased car at Honda's dealerships. This holding was directly contrary to the plain language of the Act, as the First District found in Sellers when that court concluded that, in the absence of a sale, a plaintiff in identical circumstances did not qualify as a category three consumer.

1. The Second District's Holding That A Category Three Consumer Can Enforce A Warranty That Does Not Qualify As A "Written Warranty" Under The Act Defies The Act's Plain Language And Its Sale Requirement.

In the past few years, automobile lessees have argued that even if category one and category two consumers must demonstrate a sale has occurred, category three consumers need not do so because that category of consumers neither

expressly requires a sale nor utilizes the Act's "written warranty" definition, which requires a sale to have occurred. In the absence of a sale requirement, lessees have argued that they qualify as category three consumers merely because they brought their leased vehicles to the manufacturers' dealerships and the manufacturers honored the warranties. In short, lessees have argued they can bring a Magnuson-Moss Act claim over a warranty that need not qualify as a "written warranty" under the Act.

The first courts to accept this argument were Dekelaita v. Nissan Motor Corp., 799 N.E.2d 367 (Ill. Ct. App. 2003) and Voelker v. Porsche Cars, Inc., 353 F.3d 516, 524 (7th Cir. 2003). Most recently, the Second and Third Districts accepted this argument in Mesa, O'Connor, Brophy, and the decision below in Cerasani. Every one of these courts did so without any detailed analysis of the statute. Instead, the courts simply accepted the notion that the category three consumer definition does not refer to "an implied or written warranty" and therefore a warranty meeting one of those definitions must not be required.

With due respect to these courts, this interpretation of the Act is fundamentally irreconcilable with the cause of action set forth in section 2310(d)(1). That subsection provides that "a consumer who 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, may bring suit for damages and other legal and equitable relief . . . ." 15 U.S.C. § 2310(d)(1) (emphasis added). This language permits a consumer to sue a warrantor for failing to comply with only four items: an obligation set forth in the Act, a written warranty, an implied warranty, or a service contract. The only item that can possibly be at issue here is a "written warranty" -- a term of art under the Act. A warranty in writing that does not qualify as a "written warranty" (or as a "service contract") under the Act is simply not enforceable using the Act. Accordingly, the sale requirement imposed by the Act's "written warranty" definition cannot be circumvented by holding that category three consumers can enforce any warranty in writing, regardless of whether it meets the Act's carefully crafted and limited definition of a "written warranty."

Furthermore, nothing in the definition of "consumer" alters the fundamental elements of the section 2310(d)(1) cause of action. The Act defines "consumer" in the following manner:

> [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, and [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) (numbering added). The terms "such warranty" and "the warranty" mentioned at the end of the sentence obviously refer to the more fully stated "implied or written warranty" referenced earlier in the exact same sentence.

Interpreting the category three language in Sellers, the First District rejected a lessee's argument that the third category of consumer "cover[ed] them whether the transaction be treated as a lease or a sale." 526 So. 2d at 156. Instead, the court ruled that there must be an identifiable purchase and sale before the provisions of the Magnuson-Moss Act apply -- a requirement rooted directly in the Act's definition of "written warranty." Sellers necessarily concluded that the only warranty in writing a category three consumer can base a claim upon is one that qualifies as a "written warranty" as defined by the Act.

Any contrary conclusion cannot be reconciled with the Act's plain language. If anyone who can obtain warranty work can sue under the Act as a category three consumer, then the first two categories of consumer are superfluous. One would need only ever be a category three consumer -- entitled by the terms of a warranty to enforce it -- to bring a claim under the Act. The elaborate definition of "written warranty" used by the Act would be entirely unnecessary, as would be the express purchaser requirement of the category one definition and the "during the during of an implied or written warranty" requirement of the category two definition. Interpretations that render statutory language meaningless are to be avoided

wherever possible. See, e.g., Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used"); see also U.S. v. Phipps, 81 F.3d 1056, 1060 (11th Cir. 1996) ("It is a basic tenet of statutory construction that courts should refrain from construing a statutory provision in a way that renders meaningless another provision within the same statute."). The Second District's interpretation of the category three consumer renders the category one and two consumer definitions and the Act's definition of "written warranty" meaningless.

By all appearances, the Second District and other courts reaching the same holding are uncomfortable that a product manufacturer can offer a warranty in writing to lessees, honor that warranty by attempting to make repairs, and then argue that the warranty is not enforceable under a federal law designed to permit the public to enforce product warranties. But that is not the issue here. Nor is the issue here the general ability of lessees to enforce manufacturers' warranties. The issue before this Court is the proper interpretation of a single federal act with generous remedies that was the product of congressional debate and compromise. Other laws, such as Florida's Lemon Law, expressly apply to warranties covering leased vehicles. See § 681.104, Fla. Stat.

No court should abandon the plain language of a statute simply because expanding that language furthers the statute's supposed goals. To do so violates

basic principles governing the separation of powers between the legislature and the judiciary. As the United States Supreme Court has held:

> [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law.

Rodriguez v. United States, 480 U.S. 522, 525-26 (1987) (emphasis added).

Consistent with this notion of restraint, the First District rejected the very argument accepted below when, faced with the plaintiff's argument that he qualified as a category three consumer because he was entitled to enforce the warranty at issue, the court in Sellers held that "there must be an identifiable purchase and sale before the provisions of the Magnuson-Moss Act apply." 526 So. 2d at 156. Sellers refused to read out of the Act a sales requirement that the Act plainly contains, explaining that such changes not the province of the courts – they are the work of legislatures. Id. In the over 20 years since Sellers made that point, and while the case's progeny have echoed that sentiment, Congress has not amended the Act to include claims and remedies for those who lease, rather than buy, consumer goods.

The Second District's decision conflicts with Sellers, and, more fundamentally, is irreconcilable with the language of the Act. At a minimum, this Court should hold that a category three consumer must prove not only an ability to

enforce a warranty under its terms or state law but that the warranty at issue qualifies as a written warranty (or an implied warranty) under the Act.

2. As With Category Two, Once It Is Established A "Written Warranty" Is Required It Is Plain None Exists Here Because The Sale Requirement Is Not Met.

Once it is established that a category three consumer cannot bring a claim on a warranty unless that warranty qualifies as a "written warranty" (or an "implied warranty") under the Act, it follows that Cerasani has no claim against Honda as a category three consumer. As demonstrated above, the New Vehicle Warranty does not qualify as a "written warranty" under the Act. No sale occurred. The pre-lease sale that Cerasani does allege does not qualify as a retail sale under the Act, and, moreover, it never took place, as the Lease attached to the Complaint confirms that Cerasani leased the vehicle from Crown Honda, not "Honda Leasing."

CONCLUSION

For all of the foregoing reasons, the decision of the Second District should be reversed. The Court should approve the First District's decision in Sellers.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via U.S. Mail on this 15th day of December, 2005 to: **ALEX D. WEISBERG, ESQ**., *Counsel for Respondent,* Krohn & Moss, Ltd., Sunrise Professional Center, 5975 W. Sunrise Blvd., Suite 215, Sunrise, FL 33313; and **THEODORE F. GREENE, III, ESQ.,** *Counsel for Respondent*, Law Offices of Theodore F. Greene, LC, P.O. Box 720157, Orlando, FL 32872-0157.

By: _____

CERTIFICATE OF COMPLIANCE REGARDING TYPE SIZE AND STYLE

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