

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT E. KELLY; VIRGINIA L.
KELLY,

Plaintiffs-Appellants,

v.

FLEETWOOD ENTERPRISES, INC.,
Defendant-Appellee.

No. 03-35050

D.C. No.
CV-01-00844-ALH

OPINION

Appeal from the United States District Court
for the District of Oregon
Ancer L. Haggerty, District Judge, Presiding

Argued and Submitted
March 1, 2004—Portland, Oregon

Opinion Filed May 27, 2004
Amended July 23, 2004

Before: Alfred T. Goodwin, M. Margaret McKeown, and
Raymond C. Fisher, Circuit Judges.

Opinion by Judge McKeown

COUNSEL

Danny H. Gerlt, Portland, Oregon, for the plaintiffs-appellants.

Thomas W. Sondag, Vicki L. Smith, Lane Powell Spears Lubersky LLP, Portland, Oregon, for the defendant-appellee.

ORDER

The Opinion filed on May 27, 2004, is amended. The attached amended Opinion shall be filed.

With the amendments, the panel has voted to deny the petition for panel rehearing. Judges McKeown and Fisher have voted to deny the petition for rehearing en banc, and Judge Goodwin so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

OPINION

McKEOWN, Circuit Judge:

We consider here whether personal injury and punitive damages are cognizable under the Magnuson-Moss Warranty Act (the “Act”), 15 U.S.C. § 2301 *et seq.* This consumer dispute stems from Robert and Virginia Kelly’s purchase of a leaky motor home manufactured by Fleetwood Motor Homes of California (“Fleetwood Motor Homes”). The Kellys sued Fleetwood Enterprises, Fleetwood Motor Homes’ parent company, for damages. Because the loss of enjoyment and punitive damages the Kellys seek are not recoverable under the Magnuson-Moss Act, their federal claims do not meet the Act’s \$50,000 threshold amount in controversy. Without a proper jurisdictional basis for their federal claims, the Kellys’ Oregon Lemon Law claims were not properly before the district court. We affirm the district court’s dismissal of the action. However, because the district court lacked subject

matter jurisdiction, the claims should have been dismissed without prejudice. Accordingly, the district court is instructed to enter an order reflecting a dismissal without prejudice.

BACKGROUND

In anticipation of their retirement, Robert and Virginia Kelly sold their home and bought a Fleetwood motor home from Olinger Travel Homes (“Olinger”). After moving into the new motor home, the Kellys discovered that it leaked. Olinger and Fleetwood Motor Homes attempted unsuccessfully to repair the leaks, and refused the Kellys’ demand for repurchase of the motor home.

In the precursor round to this litigation, the Kellys sued Olinger and Fleetwood Motor Homes in Oregon state court. Under the purchase agreement between the Kellys and Olinger, the dispute with Olinger went to binding arbitration, and was ultimately resolved for \$84,000 plus costs in the Kellys’ favor. Fleetwood Enterprises was not a party to that suit.

Shortly after prevailing in arbitration, the Kellys filed suit against Fleetwood Enterprises in federal district court, alleging that Fleetwood had violated substantive provisions of the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2302(a)(1), (4), (8), (9), & (13) and 2304(a)(1) & (4). The Kellys sought approximately \$27,000 in attorney’s fees spent on the arbitration, \$250,000 damages for loss of enjoyment of their retirement from the time the leaking began until the resolution of the arbitration, and \$10 million in punitive damages. The Kellys also claimed that Fleetwood violated the Oregon Lemon Law by failing to replace or refund the value of the motor home.

Fleetwood moved to dismiss for lack of subject matter jurisdiction, contending that the damages sought by the Kellys were not recoverable under the Magnuson-Moss Warranty Act, and therefore that the claim failed to satisfy the \$50,000

amount in controversy requirement of 15 U.S.C. § 2310(d)(3)(B). The district court determined that the claims did not meet the statutory requirement and dismissed the case with prejudice.

ANALYSIS

We review de novo the district court's determination that it lacked subject matter jurisdiction over the Kellys' federal claims, *Chang v. United States*, 327 F.3d 911, 922 (9th Cir. 2003), and the dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), *Libas Ltd. v. Carillo*, 329 F.3d 1128, 1130 (9th Cir. 2003).

I. THE MAGNUSON-MOSS WARRANTY ACT CLAIMS

[1] The Magnuson-Moss Warranty Act permits “a consumer who is damaged by the failure of a supplier [or] warrantor . . . to comply with any obligation under this chapter [15 U.S.C. §§ 2301 *et seq.*], or under a written warranty [or] implied warranty” to sue in United States district court provided that “the amount in controversy is [not] less than the sum or value of \$50,000 (exclusive of interest and costs) computed on the basis of all claims to be determined in this suit.” 15 U.S.C. § 2310(d).

[2] As with suits in diversity, we look no farther than the pleadings to determine the amount in controversy unless “from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed.” *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938). If it “appear[s] to a legal certainty that the claim” cannot meet the statutory threshold, the suit should be dismissed for lack of jurisdiction. *See Crum v. Circus Circus Enters.*, 231 F.3d 1129, 1131 (9th Cir. 2000); *Boelens v. Redman Homes, Inc.*, 748 F.2d 1058, 1069 (5th Cir. 1984) (applying the legal certainty test to a Magnuson-Moss Warranty Act claim); *see also Samuel-Bassett v. Kia Motors Am., Inc.*, 357

F.3d 392, 402 (3d Cir. 2004) (“[F]ederal jurisdiction for a Magnuson-Moss Act claim does not exist unless the amount in controversy exceeds \$50,000 . . .”). Because the Kellys’ claims fall into this category, the district court was correct in rejecting the federal claims.

A. PERSONAL INJURY DAMAGES

[3] The Magnuson-Moss Warranty Act expressly precludes recovery under the Act for personal injury, with three exceptions: Nothing in this chapter [15 U.S.C. § 2301 *et seq.*] (other than sections 2308 and 2304(a)(2) and (4) of this title) shall . . . impose liability on[] any person for personal injury, or . . . supersede any provision of State law regarding consequential damages for injury to the person

15 U.S.C. § 2311(b)(2). Of the three provisions exempted from § 2311’s exclusion of personal injury claims, the Kellys accuse Fleetwood of violating only § 2304(a)(4).

[4] On its face, it appears that the Kellys’ claim falls into one of the Act’s exceptions. Our examination of the statute and its structure leads us to conclude, however, that the statute contains a typographical error and that § 2304(a)(3), not § 2304(a)(4), should have been listed as one of the exemptions. The inclusion of § 2304(a)(4) was a drafting mistake.

[5] The two federal courts to consider this issue have concluded that the evidence is strong that § 2304(a)(4) “was included in § 2311(b)(2) because of an error in draftsmanship.” *Gorman v. Saf-T-Mate, Inc.*, 513 F. Supp. 1028, 1035 (N.D. Ind. 1981); *see Boelens*, 748 F.2d at 1065 n.10 (agreeing with *Gorman*). Congress intended the Magnuson-Moss Warranty Act to create personal injury liability only under very limited circumstances. *See Gorman*, 513 F. Supp. at 1035 (“Congress was content to let the question of personal injury products liability remain a matter of state-law causes of action, except to the extent that certain substantive provisions

in the Magnuson-Moss Act overrule contrary state laws relating to the warrantor's ability to disclaim personal injury liability."'). Thus, Congress intended to create personal injury liability under the Act to address the limited circumstance of "the warranty wherein the large print giveth but the small print taketh away." *Id.*; see also *Boelens*, 748 F.2d at 1065 n.10 (personal injury damages only available under the Act to remedy violations of the requirement "that limitations on liability for consequential damages be conspicuously displayed on the warranty instrument").

[6] Of the three provisions listed as exceptions in § 2311(b)(2), only two fall into this category: Sections 2308 and 2304(a)(2). Both of these provisions restrict a warrantor's ability to disclaim or limit the applicability of implied warranties. See 15 U.S.C. § 2308 (stating that "[n]o supplier may disclaim or modify . . . any implied warranty," subject to some qualifications); 15 U.S.C. § 2304(a)(2) ("[A] warrantor may not impose any limitation on the duration of any implied warranty on the product . . ."). Section 2304(a)(3)—although not listed in § 2311(b)(2) as an exception—serves a similar purpose. See 15 U.S.C. § 2304(a)(3) ("[A] warrantor may not exclude or limit consequential damages for breach of any written or implied warranty on such product, unless such exclusion or limitation conspicuously appears on the face of the warranty . . .").

[7] On the other hand, § 2304(a)(4), which *is* listed as an exception to § 2311(b)(2), "is concerned solely with informal repair or replacement remedies and clearly has no relevance to situations involving personal injury damages." *Gorman*, 513 F. Supp. at 1035. Juxtaposing the dissimilarity of § 2304(a)(4) from these other provisions with the intent of Congress in drafting the Act, we conclude that the statutory reference to § 2304(a)(4) was, in fact, just one subsection off: "[Section] 2311(b)(2) was intended to refer not to § 2304(a)(4), but, rather, to § 2304(a)(3) . . ." *Boelens*, 748 F.2d at 1065 n.10.

[8] Thus construed, none of the Kellys' claims fall within the exceptions to § 2311(b)(2), and consequently the Act affords them no right to any damages arising from personal injury liability. *See Boelens*, 748 F.2d at 1065-66. The \$250,000 the Kellys claim they incurred due to "loss of enjoyment of retirement" is precisely the type of relief potentially available under state law but not under the Magnuson-Moss Warranty Act. Indeed, it is difficult to imagine classifying "loss of enjoyment" as anything other than injury to the person.

[9] The Kellys' argument that the loss of enjoyment damages are properly characterized as "noneconomic" rather than "personal injury" is a semantic distinction that bears no fruit in these circumstances. Nothing about noneconomic damages suggests that they are mutually exclusive from personal injury damages. A quick look at Oregon law illustrates that noneconomic damages are precisely the kind of damages that can stem from personal injury liability. *See Or. Rev. Stat. § 18.560(2)(b)* (" 'Noneconomic damages' means subjective, nonmonetary losses, including but not limited to pain, mental suffering, emotional distress, humiliation, injury to reputation, loss of care, comfort, companionship and society, loss of consortium, inconvenience and interference with normal and usual activities apart from gainful employment. "). Because it is clear "to a legal certainty" that the \$250,000 the Kellys seek in loss of enjoyment damages are not cognizable under the Magnuson-Moss Warranty Act, that claim cannot be counted towards satisfaction of the \$50,000 amount in controversy requirement. *See Boelens*, 748 F.2d at 1069.

B. OTHER DAMAGES

[10] The remaining damages are the \$27,000 for attorney's fees spent on arbitration, and \$10 million in punitive damages. Because punitive damages are not recoverable under the Act, and the attorney's fees alone amount to less than \$50,000, we need not resolve the parties' dispute over

whether the attorney's fees may be counted toward the amount in controversy requirement.

As the Kellys candidly acknowledge, no statutory or case authority establishes the availability of punitive damages for the violations of the Magnuson-Moss Warranty Act alleged in their complaint. *See generally* 15 U.S.C. § 2301 *et seq.* State law generally guides courts in determining whether punitive damages are available as a remedy for breach of warranty under the Act. *See Boelens*, 748 F.2d at 1069-71 (applying Texas law).

[11] The Kellys concede that Oregon law would not sustain a punitive award for breach of warranty, but instead argue that they are entitled to \$10 million to punish Fleetwood for “intentional noncompliance with substantive obligations under the Act.” We disagree. To hold otherwise would require us to read into the Act a punitive purpose at odds with Congress’s intent “to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms.” 15 U.S.C. § 2310(a)(1); *see also Boelens*, 748 F.2d at 1067 (The Act “is remedial in nature and is designed to facilitate relief which would otherwise not be available as a practical matter for individual consumers.” (quoting H.R. Rep. No. 1107, 93d Cong. (1974), *reprinted in* 1974 U.S.S.C.A.N. 7702, 7724). Additionally, the result the Kellys advocate would permit litigants to circumvent the \$50,000 threshold requirement of § 2310(d)(3)(B) simply by arbitrarily tacking a substantial sum of punitive damages onto a minimal compensatory damages claim. Because our role is to adjudicate, not legislate, we decline the Kellys’ invitation to write a punitive damages provision into the Magnuson-Moss Warranty Act. The district court was correct in determining that the Kellys’ claims fail to meet the amount in controversy requirement.

II. THE OREGON LEMON LAW CLAIMS

[12] The Kellys also seek relief against Fleetwood Enterprises under Oregon’s Lemon Law, which permits limited

recovery “if the court finds that the manufacturer did not act in good faith.” Or. Rev. Stat. § 646.359(1). The Kellys allege no independent basis for subject matter jurisdiction over their state law claims, but instead rely upon the district court’s supplemental jurisdiction. *See* 28 U.S.C. § 1367(a). However, because the Kellys failed to satisfy the Magnuson-Moss Act’s \$50,000 jurisdictional prerequisite, there were no “claims in the action within [its] original jurisdiction” to form the basis for supplemental jurisdiction. *Id.* We affirm the district court’s dismissal of these claims.

[13] AFFIRMED with instructions to the district court to enter an order of dismissal without prejudice.