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CONSUMERS SWALLOW ANOTHER LEMON: AGENCY CONSENT ORDER PREEMPTION OF STATE "LEMON LAW" STANDARDS FOR INFORMAL DISPUTE RESOLUTION

*General Motors v. Abrams*¹

I. INTRODUCTION

The doctrine of federal preemption continues to be a key battleground in the development of the consumer movement and in ongoing struggles between consumers and manufacturers. Whereas federal preemption once was used to expedite progress in the implementation of remedial legislation, changes in the balance of power at the federal level have created opportunities for manufacturers to use their renewed influence in the executive branch (and through its appointments, in the regulatory agencies) as both a shield from more aggressive state enforcement of consumer rights and a sword against consumer access to the courts.²

General Motors v. Abrams represents one such effort. It also represents an early battle in the struggle to maintain influence over the format and rules of informal dispute resolution programs. Driven in part by crowded court dockets and skyrocketing legal costs, policymakers at both the state³ and federal⁴ levels increasingly encourage or require the use of such programs, where available, before allowing recovery in the courts. In addition, *General Motors v. Abrams* raises important policy questions: what are the best methods for (1) conducting

1. 703 F. Supp. 1103 (S.D.N.Y. 1989).

2. The author is a former lobbyist for a state consumer organization.

3. See, e.g., N.Y. GEN. BUS. LAW § 198-a (McKinney 1988) (consumers must seek arbitration before pursuing court action; manufacturers' programs must meet the FTC's minimum standards); MINN. STAT. § 325F.665 (1988) (manufacturer may require consumer to participate in informal dispute resolution before state court action); TEX. REV. CIV. STAT. ANN. art. 4413(36), § 6.07 (Vernon 1976 & Supp. 1985) (use of state informal dispute resolution program without prejudice to consumer; if used, allows more beneficial posture regarding presumptions and remedies in later court action). The general policy is to offset such a requirement with standards protecting the consumer which the manufacturer's program must meet. This policy also animates Magnuson-Moss, *infra* note 4.

4. See 15 U.S.C. § 2310(a)(3) (1982) (manufacturers offering informal dispute resolution mechanisms in written warranties which meet minimum standards may require consumer to use prior to commencing civil action). See also *supra* note 3.

and (2) regulating informal dispute resolution in the context of a nationwide dispute between consumers and a large manufacturer?⁵

This Note will first examine the background of *GM v. Abrams*, which involves a successful attempt by General Motors (GM) to use a Federal Trade Commission (FTC) consent order to block the application of New York's "Lemon Law"⁶ to the arbitration program contained in the order.⁷ Second, it will discuss the legal context of the dispute (chiefly the extension of the federal preemption doctrine to "implicitly preemptive" agency consent orders). Third, it will outline the court's application of that doctrine in the instant case. Finally, it will offer a critical evaluation of both the legal and policy grounds of the decision, concluding with suggestions for legislative action which would sharpen the resolution of the issues involved, enhance the fairness and progress of informal dispute resolution, and better protect the consumer.

II. BACKGROUND OF *GM v. Abrams*

In 1980, the Federal Trade Commission (FTC) issued a complaint against General Motors (GM) for, *inter alia*, failing to notify consumers of serious defects in the powertrain components of a large quantity of GM products in violation of section 5 of the Federal Trade Commission Act, as amended.⁸ The case was settled by a consent order, approved by the FTC in 1983,⁹ which required GM to "implement a nationwide third-party arbitration program to settle complaints of individual owners relating to powertrain components."¹⁰

The FTC consent order referenced an arbitration program developed by GM in conjunction with the Better Business Bureau (BBB).¹¹ This program ordinarily employs lay arbitrators from the community and urges them to decide cases based on "their own sense of fairness."¹² There is, however, some language in the program manuals which indicates the arbitrations will be

5. General Motors is "the largest company in the world." *General Motors Corp.*, 102 F.T.C. 1741, 1744 (1983) (separate statement of Commissioner Pertschuk).

6. A "lemon law" is a law requiring manufacturers to offer refunds, repairs or replacements (in some combination) for recently purchased motor vehicles which are deemed "defective" or beyond repair. While "the vast majority" of states have adopted such laws, standards for classification as a "lemon" and remedial schemes vary. Annotation, *Validity, Construction, and Effect of State Motor Vehicle Warranty Legislation (Lemon Laws)*, 51 A.L.R. 4th 872 (1987). See also *infra* note 102. The instant court notes that, in essence, lemon laws create a statutory warranty. See *Abrams*, 703 F. Supp. at 1104-05.

7. *General Motors*, 102 F.T.C. at 1750-1803.

8. *Id.* at 1742-43.

9. *Id.* at 1749.

10. *Id.* at 1761.

11. *Id.* Specific modifications to this program were ordered in Attachment B. *Id.* at 1790.

12. Affidavit of Dean W. Determan at paragraph 8, cited in *Abrams*, 703 F. Supp. at 1110.

conducted according to the law of the state in which they are held.¹³ The order did not specify whether or not it was intended to preempt state regulations which may be triggered by the program.¹⁴

In 1986, New York amended its 1983 "Lemon Law"¹⁵ to include a series of new standards for informal dispute resolution programs offered by manufacturers to New York consumers.¹⁶ Among these were provisions requiring: (1) inclusion of all state "Lemon Law" remedies;¹⁷ (2) arbitrators to be trained and familiar with the terms of the New York Lemon Law; (3) consumers to be permitted to make oral presentations;¹⁸ (4) the arbitration system to comply with federal law to the extent it applied;¹⁹ (5) consumers to be supplied with a copy of the Lemon Law "Bill of Rights" at the time of the arbitration;²⁰ and (6) the keeping of specified records by the manufacturer.²¹

Abrams, the Attorney General of New York, sought to compel GM to comply with the New York Lemon Law (including the 1986 amendments) in its arbitrations of the complaints of New York consumers.²² GM sought a declaratory judgment in the United States District Court for the Southern District

13. See, e.g., *General Motors*, 102 F.T.C. at 1771: "The law of the state where your dispute is arbitrated shall apply." (quoting Attachment A of the order, entitled *General Motors Zone Handbook for Third-Party Arbitration*). The relevant subsection is labeled, "Arbitration: A National Program of Dispute Resolution: National Program of Consumer Arbitration Through the Better Business Bureaus: Uniform Rules for Better Business Bureau Arbitration." Paragraph three of that subsection, quoted above, is entitled, "The state law." General Motors and the court argue that this language only applies to strictly procedural rules and that the lemon law provisions are too substantive in nature to be encompassed by this provision. See *Abrams*, 703 F. Supp. at 1112-13. But see *infra* note 68.

14. See *General Motors*, 102 F.T.C. at 1750-1803. New York's statute regulates informal dispute resolution programs when offered by manufacturers, but does not require manufacturers to offer such programs. See *infra* note 16.

15. N.Y. GEN. BUS. LAW § 198-a (McKinney 1988).

16. The listed amendments to follow formed the portion of the law challenged by GM as preempted by the 1983 FTC Consent Order. *Abrams*, 703 F. Supp. at 1105-06.

17. N.Y. GEN. BUS. LAW § 198-a(g), (m)(1)(iii) (McKinney 1988). The New York remedies include the right to have a "lemon" (a car which is so defective that it "substantially impairs its value" even after a reasonable number of repair attempts) replaced or the consumer awarded a full refund, at the consumer's option. *Id.* A presumption of a "reasonable number" is defined in the statute as four attempts to repair the same defect within the first eighteen thousand miles of operation or the first two years, whichever comes first. Alternatively, a car out of repair for a cumulative total of 30 days during that period qualifies as a "lemon." *Id.* at § 198-a(d).

18. N.Y. GEN. BUS. LAW § 198-a(m)(1)(i) (McKinney 1988).

19. N.Y. GEN. BUS. LAW § 198-a(m)(1)(ii) (McKinney 1988). This section, in essence, means that programs offered by manufacturers must meet the Magnuson-Moss Act minimum standards, as defined in the FTC's Rule 703 (1983). See 16 C.F.R. § 703 (1983). Far from presenting a conflict, this amendment was adopted "consistent with the goal of minimizing differences in state and federal compliance requirements." Givens (former FTC Regional Director), *Practice Commentaries to §198-a at 315* (1988).

20. N.Y. GEN. BUS. LAW § 198-a(m)(2) (McKinney 1988).

21. *Id.* §198-a(m)(3), cited in *Abrams*, 703 F. Supp. at 1105.

22. *Abrams*, 703 F. Supp. at 1106.

of New York to hold the Lemon Law preempted and unenforceable as the result of the FTC Consent Order.²³

The issues in the case are: (1) Can a consent order issued by a federal regulatory agency preempt a state statute? (2) If so, does this particular FTC consent order preempt application of the 1986 amendments to the New York Lemon Law to GM's arbitrations in this case?²⁴

Abrams argued that an FTC consent order can never preempt a state statute; or, alternatively, that it could not do so in the instant case.²⁵ GM argued that such consent orders can have preemptive force and that the instant order was of that nature.²⁶ The FTC, through its general counsel, filed an *amicus curiae* brief arguing that its consent orders sometimes preempt state law, but that this one did not.²⁷ However, the Chairman of the FTC (Daniel Oliver) sent a separate "statement" arguing that the instant order was preemptive.²⁸ (The court observes that Chairman Oliver's statement was the equivalent of a dissent.)²⁹

The United States District Court for the Southern District of New York held that the FTC consent order preempted the New York Lemon Law in this case because: (1) the order "occupied the field" in its regulatory impact; and (2) the Lemon Law "creates an obstacle to the accomplishment and execution of the full federal purposes and objectives, as expressed in the consent order."³⁰ GM was therefore awarded summary judgment.³¹

III. LEGAL CONTEXT

The question of whether a state's specific standards for informal dispute resolution programs offered by manufacturers can be triggered when such a program is required by an FTC consent order, rests upon a Supremacy Clause analysis.³²

Federal *regulations* issued by administrative agencies under powers delegated by Congress have long been held to have the same preemptive effect as federal

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 1111.

31. *Id.* at 1113.

32. U.S. CONST. art. VI, cl. 2 provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

statutes.³³ In *Motor Vehicle Manufacturers Association of the United States v. Abrams*³⁴, Judge Sand of the United States District Court for the Southern District of New York held that FTC regulations promulgated under the Magnuson-Moss Act³⁵ preempt certain portions of the New York Lemon Law.³⁶ The United States Court of Appeals for the Fourth Circuit has similarly held that FTC regulations of informal dispute settlement mechanisms which are offered by manufacturers as part of a written warranty "leave no room for state regulation."³⁷ Other courts, however, find room for state regulation in this context, but only by holding that the regulations are not intended to be preemptive.³⁸

Similarly, there are federal cases which hold that the *orders* of federal regulatory agencies preempt the *orders* of state regulatory bodies.³⁹ There are also *state* intermediate court decisions which hold that *FTC consent orders* preempt state statutes.⁴⁰ However, there apparently is no prior *federal* case which reaches the question of whether a federal agency's consent order preempts a state statute.⁴¹

33. *Hillsborough County v. Automated Medical Labs*, 471 U.S. 707, 713 (1985). See also *Fidelity Fed. Sav. & Loan v. de la Cuesta*, 458 U.S. 141, 153-54 (1982).

34. 697 F. Supp. 726 (S.D.N.Y. 1988). See also Note, *A Sour Lemon? Federal Preemption of Lemon Law Regulations of Informal Dispute Resolution: Motor Vehicle Manufacturers' Association v. Abrams*, 1989 J. DISP. RES. 199 (authored by David P. Hiatt).

35. Magnuson-Moss Warranty--Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-2312 (1982).

36. Specifically, the court held the following sections preempted: N.Y. GEN. BUS. LAW § 198-a(g) (minimum requirements for informal dispute resolution offered by manufacturers on a voluntary basis before consumers are required to use them); § 198-a(h) (arbitrator's decision binding); and § 198-a(m) (arbitrator training, recordkeeping, notice to consumer, compliance with otherwise optional Magnuson-Moss FTC regulations required, oral hearing provision). See Note, *supra* note 34, at 223. GM's program, however, did not qualify under the federal regulations since it was not offered as part of a prior written warranty. See 15 U.S.C. § 2310 (1982).

37. *Wolf v. Ford Motor Co.*, 829 F.2d 1277, 1279 (4th Cir. 1987). However, the Court noted the consumer's recovery under the Virginia Lemon Law was not disturbed by its holding that Rule 703 prevented a consumer from challenging the *bona fide* nature of the private dispute settlement mechanism through a state common law fraud action. *Id.* at 1277-78.

38. See, e.g., *Chrysler Corp. v. Texas Motor Vehicle Comm'n.*, 755 F.2d 1192 (5th Cir. 1985) (state procedure for informal dispute settlement at consumer's option may coexist with procedures offered by manufacturers which comply with Magnuson-Moss). See also *Auto Importers of Am., Inc. v. Minnesota*, 681 F. Supp. 1374 (D. Minn. 1988) (state law requiring manufacturers to offer informal dispute settlement mechanisms).

39. See, e.g., *New England Tel. and Tel. Co. v. Public Utilities Comm'n.*, 570 F. Supp. 1558, 1570 (D. Me. 1983) (FCC).

40. See *State ex rel. Van de Camp v. Texaco, Inc.*, 193 Cal. 3d 8, 762 P.2d 385, 219 Cal. Rptr. 221, (1988) (antitrust).

41. *Abrams*, 703 F. Supp. at 1107-08. The Attorney General observes:

There simply is no federal precedent for preempting a state law on the basis of any agency consent order. Strictly speaking, that appears to be true. The parties do not cite, and the Court has not found, a federal case giving preemptive effect to a federal agency's order over a state statute. . . . Neither can the Attorney General point to a case, federal or state, holding that a consent order can never have that effect.

Attorney General's main brief at 9, *General Motors v. Abrams*, 703 F. Supp. 1103 (S.D.N.Y. 1989).

The United States Supreme Court has never confronted this issue directly. In *Louisiana Public Service Commission v. FCC*,⁴² the Court held that certain Federal Communications Commission (FCC) orders did not preempt state regulation.⁴³ In so doing, however, the Court observes, "[P]re-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation."⁴⁴ Since orders, rather than rulemakings, were at issue,⁴⁵ the orders of federal agencies may presumably, in some cases, be preemptive.⁴⁶

The high Court notes that the ultimate question in preemption cases is "whether Congress intended that federal regulation supersede state law."⁴⁷ Congressional intent to preempt may be found either expressly or inferred from the circumstances.⁴⁸ "Pre-emption is not to be lightly presumed;"⁴⁹ in fact, courts should, wherever possible, interpret language to avoid conflicts.⁵⁰ Thus, express preemption can be found only where Congress "expresses a clear intent to pre-empt state law."⁵¹

42. 476 U.S. 355 (1986).

43. In *Louisiana PSC*, however, there was explicit congressional exclusion of preemption in the area at issue. *Id.* at 377.

44. *Id.* at 369. The Court cites *Fidelity Federal*, 458 U.S. 141; and *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984).

45. However, the instant court acknowledges that, due to their "industry-wide scope," the orders at issue in *Louisiana PSC* "may be more closely analogous to regulations than to the consent order at bar." *Abrams*, 703 F. Supp. at 1107-08.

46. Although the state regulation preempted in *Louisiana PSC* is not a statute, the high court's references to preemption of state "law" in this instance lends persuasive credence to the inference that state statutes may be preempted by the orders of federal agencies. *Louisiana PSC*, 476 U.S. at 374.

47. *Id.* at 369.

48. *Id.* at 368-69.

49. *California Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987). *Abrams* notes that this is particularly true in fields such as consumer protection and warranty law, which are traditionally the province of states. See *Pacific Gas & Elec. Co. v. Energy Resources Comm'n*, 461 U.S. 190 (1983); *Chrysler Corp. v. Texas Motor Vehicle Comm'n*, 755 F.2d 1192, 1205 (5th Cir. 1985); *Auto Importers of Am., Inc. v. Minnesota*, 681 F. Supp. 1374, 1377 (D. Minn. 1988). See also *infra* note 63.

50. *Louisiana PSC*, 476 U.S. at 370. This duty is heightened when dealing with the regulations of agencies rather than statutes. As the Supreme Court noted in *Hillsborough County*:

We are even more reluctant to infer pre-emption from the comprehensiveness of regulations than from the comprehensiveness of statutes. As a result of their specialized functions, agencies normally deal with problems in far more detail than does Congress. To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence.

Hillsborough County, 471 U.S. at 717. See also *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

51. *Louisiana PSC*, 476 U.S. at 368 (citing *Jones*, 430 U.S. 519). For the application of this "clear intent" standard to a Lemon Law preemption dispute, see *Chrysler Corp.*, 755 F.2d at 1205 (finding no clear intent and therefore no preemption).

The Supreme Court's "clear intent" standard is the rule in any case of preemption, express or implied, in which the area of regulation is one traditionally occupied by the states.⁵² Thus, for example, the Supreme Court has held that a presumption exists "that state and local regulation of health and safety matters can constitutionally coexist with federal regulation."⁵³

When express preemption is lacking, courts may infer preemption if: (1) "there is outright or actual conflict," (e.g., it is "physically impossible" to comply with both federal and state law);⁵⁴ (2) federal law contains an implicit barrier to state regulation;⁵⁵ (3) Congress has legislated so comprehensively as to "occupy an entire field of regulation" and leave "no room for the states to supplement federal law;"⁵⁶ or (4) "where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress."⁵⁷

Most recent cases collapse the second test into the remaining three.⁵⁸ As will be noted below, a combination of tests 1 and 3 (test 1(b) below) plus test 4 (test 2 below) form the basis of the Court's holding in the instant case.

IV. THE COURT'S RULING

The judge in the instant case first notes that the authority for the consent order is not being challenged.⁵⁹ There is, he concludes, no essential difference between agency rulemaking and agency orders for the purposes of a Supremacy Clause analysis; nor does either differ from federal statutes for such a purpose.⁶⁰ Thus, a traditional Supremacy Clause analysis is appropriate.⁶¹

Under such an analysis, preemption turns on the intent of Congress. Preemption is not to be lightly presumed, particularly in areas traditionally within

52. *Hillsborough County*, 471 U.S. at 715-16 (note particularly the reference to "implicit" preemption at 716); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

53. *Hillsborough County*, 471 U.S. at 716 (national blood policy not preemptive of local regulations).

54. *Free v. Bland*, 369 U.S. 663 (1962); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), cited in *Louisiana PSC*, 476 U.S. at 368.

55. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), cited in *Louisiana PSC*, 476 U.S. at 368.

56. *Louisiana PSC*, 476 U.S. at 368 (citing *Rice*, 331 U.S. 318).

57. *Hines v. Davidowitz*, 312 U.S. 52 (1941), cited in *Louisiana PSC*, 476 U.S. at 369.

58. See *Auto Importers*, 681 F. Supp. at 1377 (citing *Fidelity*, 458 U.S. at 153); *Guerra*, 479 U.S. 272; *Michigan Cannery & Freezers Ass'n, Inc. v. Bargaining Bd.*, 467 U.S. 461 (1984). *Fidelity* was decided in 1982, *Guerra* in 1987.

59. *Abrams*, 703 F. Supp. at 1107-08.

60. *Id.* at 1108. This assumes, of course, that the agency's actions are within the authority delegated by the Congress, which is not challenged by *Abrams* in this case. See *supra* note 60. Note the court's failure to recognize the greater presumption against preemption in cases involving agency action. See *supra* note 51.

61. *Id.* at 1109.

the authority of the states (such as consumer protection and warranty).⁶² Preemption may be either expressed or implied in the statute.⁶³ In this case, the issue is whether preemption is implied.⁶⁴

An inference of implied preemption is appropriate when Congress: (1) "occupies the field" in the area of regulation, either (a) totally or (b) partially but in such a way that compliance with both federal and state regulations is a "physical impossibility"; and/or (2) "when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁶⁵

In *General Motors v. Abrams* the judge held that test 1(b)--actual conflict resulting in physical impossibility⁶⁶--requires an inference of preemption because there is a direct conflict between the standards for training and decision-making set forth for arbitrators under the program adopted by GM pursuant to the consent order and those required by the New York Lemon Law. Specifically, GM (and the consent order) chose to adopt (with modifications) the program of the Better Business Bureau (BBB), which requires no formal training of arbitrators and employs a "common sense" method of decision-making without reference to actual law.⁶⁷ New York, on the other hand, requires judge-like training for arbitrators and rulings based on formal law.⁶⁸ The order thus "occupies the field," according to the judge, and preemption is to be inferred.⁶⁹

62. *Id.* See *Guerra*, 479 U.S. at 281. See also *supra* note 50. "Congress legislated here in a field which the States have traditionally occupied (citations omitted). So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice*, 331 U.S. at 230.

63. *Abrams*, 703 F. Supp. at 1109.

64. *Id.*

65. *Id.* at 1109-10 (citing *Fidelity Federal*, 458 U.S. at 153; and *Rice*, 331 U.S. at 230). Note the collapsing and remixing of the *Louisiana PSC* criteria. See *supra* notes 55-59.

66. This test is a combination of tests 1 and 3 of *Louisiana PSC*.

67. However, attachments ordered by the FTC to the consent order of arbitration program materials prepared by GM and the BBB specify in three different places that state law will apply. Attachment A (*The Zone Handbook for Third-Party Arbitration*), 102 F.T.C. at 1771, unequivocally explains: "The law of the state where your dispute is arbitrated shall apply." The same attachment at 1774 notes: "The Arbitrator may make any decision which the Arbitrator deems to be fair and equitable within the scope of your agreement to arbitrate, *provided state law does not prohibit all or part of that decision.*" (emphasis added). Attachment C (*General Motors Consumer Arbitration Program*) at 1797 enumerates among "[t]he basic principles of BBB arbitration" that it is "[c]onsistent with state law." The court rationalizes away the latter two statements in *Abrams* based on an affidavit of a former General Counsel (Determan) who helped design the program. *Abrams*, 703 F. Supp. at 1112-13.

68. In essence, the judge objects to making the "specific standards for liability and relief" contained in the original New York Lemon Law binding upon arbitrators under the 1986 amendments. *Abrams*, 703 F. Supp. at 1111. He does not want an arbitrator who finds that a repair has been unsuccessfully attempted four times for a single defect within the first eighteen thousand miles or two years of ownership (or that a car has been out of commission for a total of 30 days during that period) to have to award a refund or replacement at the consumer's option. *Id.*

69. *Id.* at 1111.

Test 2--obstacle to Congressional objectives--also requires an inference of preemption, according to the judge. Both the intent of Congress to facilitate the resolution of disputes through consent orders⁷⁰ and the intent of Congress and its agent (the FTC) to facilitate the adoption of informal dispute settlement mechanisms are frustrated by New York's additional procedures and requirements.⁷¹ In addition, the judge finds an essential feature of the FTC order (and thus an objective of Congress' duly authorized agent) to be a program of nationwide uniformity. This, he contends, is frustrated by allowing the application of state laws.⁷² Thus, the Court holds that application of the New York statute is implicitly preempted and GM is entitled to summary judgment.⁷³

V. CRITICAL EVALUATION

General Motors v. Abrams is decided incorrectly. The court fails to properly apply the Supreme Court's "clear intent" standard. The court confuses the interests and policies of GM and the BBB with those of Congress and the FTC. Moreover, the decision is, from a public policy standpoint, a real "lemon" to consumers, to democracy, and to the advancement of alternative dispute resolution techniques.

A. The Legal Issues

The court clearly fails to apply the "clear intent" standard⁷⁴ to its analysis of the guidance offered by Congress and the FTC in this case. Heightened scrutiny in the form of a strong presumption against preemption is appropriate because: (1) the conflict is precipitated by the action of an agency, not a statute;⁷⁵ (2) the conflict lies within areas traditionally within the domain of the states (*e.g.*, consumer protection, warranty, safety);⁷⁶ and (3) the inference drawn is a negative one (based upon the absence of language one way or another). In

70. This intent and authority is found in the original FTC Act of 1914. *See id.* at 1104. *See also infra* note 119.

71. *Abrams*, 703 F. Supp. at 1111-12.

72. This contention is dubious. First, it is difficult to see how a program which allows each individual arbitrator to apply his own standards of decision-making--or no standards--will facilitate uniformity. It is more likely to do the opposite. *See General Motors*, 102 F.T.C. at 1743-44 (separate statement of Commissioner Pertschuk). Second, the program in question included a specific subsection providing for the use of state law, yet listed it under a section labeled, "A National Program of Dispute Resolution: Uniform Rules for Better Business Bureau Arbitration." *Id.* at 1771 (emphasis added). Third, the FTC denied that the program was designed to preempt state law in its *amicus* brief, as noted *supra*, Section II.

73. *Abrams*, 703 F. Supp at 1115.

74. *See supra* note 52 and accompanying text.

75. *See supra* note 51.

76. *See supra* notes 50 and 63.

such a case, the Supreme Court "will seldom infer" an intent to preempt, reasoning that if Congress or the agency had meant to preempt, they would have said so.⁷⁷

These factors distinguish the instant case from the precedents cited to support it, in which the agency invariably expressed an intention to preempt and the issue was merely whether it had a right to do so under authority delegated by Congress.⁷⁸ Moreover, in the present case, it seems clear that the FTC not only did not intend to preempt; it intended not to preempt,⁷⁹ as its *amicus* brief explicitly states.⁸⁰

It seems equally clear that Congress would not agree with the court's inference of its intent. As in *Louisiana PSC*,⁸¹ Congress expressly contemplated a dual system of regulation. Throughout the Magnuson-Moss Act,⁸² Congress set "minimum" (not "exclusive" or "maximum") standards for industry compliance.⁸³ The court in *Auto Importers*⁸⁴ emphasizes the suggestion in section

77. Thus, in *Hillsborough County*, 471 U.S. at 718, the Supreme Court notes:

[B]ecause agencies normally address problems in a detailed manner and can speak through a variety of means, including regulations, preambles, interpretive statements, and responses to comments, we can expect that they will make their intentions clear if they intend for their regulations to be exclusive. Thus, if an agency does not speak to the question of pre-emption, we will pause before saying that the mere volume and complexity of its regulations indicate that the agency did in fact intend to pre-empt. Given the presumption that state and local regulation related to matters of health and safety can normally coexist with federal regulations, we will seldom infer, solely from the comprehensiveness of federal regulations, an intent to pre-empt in its entirety a field related to health and safety.

Id.

Although the issue in the instant case is an agency consent order, the FTC had ample opportunity (three years) to raise and dispose of the issue in its order; in the statements of commissioners attached to the order; in the notice published in the *Federal Register*; etc. See *General Motors*, 102 F.T.C. at 1741.

78. See, e.g., *Auto Importers*, 681 F. Supp. at 1379 n.8 (noting *Fidelity's* basis in language designating the area to be governed "exclusively by federal law"); *New England Tel. & Tel.*, 570 F. Supp. at 1559.

79. Intent of the agency not to preempt was a critical factor in a finding of no preemption by the U.S. Supreme Court in *Hillsborough County*, 471 U.S. at 716 (FDA).

80. See *supra* note 28. But cf. *supra* note 29 (chairman dissents). Thus, the FTC noted in reference to a similar case:

Magnuson-Moss makes it clear that the preservation of consumer rights and remedies under state law is paramount: it not only sets no limitation on the savings clause for state-created rights and remedies, but it expressly subordinates the preemption provision to the savings clause. Also, the legislative history of the federal law shows that Congress anticipated additional state legislation even in areas where Congress had acted.

Auto Importers, 681 F. Supp. at 1378 n.5. See also *infra* note 91.

81. 476 U.S. 355.

82. 15 U.S.C. §§ 2301-2312 (1982).

83. See, e.g., 15 U.S.C. § 2310(a)(2) (1982) (directing the FTC to "prescribe rules setting forth minimum requirements for any informal dispute settlement procedure") (emphasis added). See also 15 U.S.C. § 2304 ("Federal Minimum Standards for Warranties"). See also *supra* note 81 and *infra* note 90.

84. 681 F. Supp. at 1380 & n.11.

2310(a), which regulates informal dispute settlement mechanisms, that Congress "envisioned such [state] enhancements [of consumer protection] insofar as it directed the FTC to 'prescribe rules setting forth *minimum requirements* for any informal dispute settlement procedure.' . . ."⁸⁵

The general policy intent of Congress *not* to preempt state (or other federal) remedies for the ills Magnuson-Moss is designed to address is evident from the savings clause: "Nothing in this chapter shall invalidate or restrict any right or remedy of any consumer under state law or any other federal law."⁸⁶ Specific exceptions to this principle are listed in a later subsection.⁸⁷ Noticeably absent from this subsection is the section covering informal dispute resolution.⁸⁸ The FTC has issued an interpretation of the act clearly delineating the intention of Congress to subordinate its limited preemptive objectives to those of the general savings clause.⁸⁹

Thus, other courts which have fully explored the legislative and administrative history of Magnuson-Moss have found no intention by Congress to "occupy the field;" nor have they found an "obstacle to the accomplishment and execution of the full objectives of Congress."⁹⁰

The policies that the instant court finds infringed relate to: (1) the settlement of cases through consent orders; (2) the right of the manufacturer to be free from a patchwork of state requirements; and (3) the superiority of the arbitration methodology devised by GM and the BBB to that of New York's Lemon Law.⁹¹

85. *Id.* (emphasis in original).

86. 15 U.S.C. § 2311(b)(1) (1982).

87. *See* 15 U.S.C. § 2311(c)(1) (1982). Even these limited exceptions may be overridden upon application and showing by a state agency that state regulations: (1) better protect consumers; and (2) do not unduly burden interstate commerce. 15 U.S.C. § 2311(c)(2).

88. *Compare* 15 U.S.C. § 2311(c)(1) with § 2310(a). *See also supra* notes 81 and 84. *See also infra* note 90.

89. As cited by the court in *Auto Importers*, 681 F. Supp. at 1379 n.6, the FTC writes:

In general, the protections of the Warranty Act are in addition to, rather than in lieu of, warranty rights and remedies under State law. Only a very narrow class of State requirements are "preempted". . . . [W]hile allowing the use of uniform warranty documents is a goal of [the preemption clause], this goal is subordinate to that of permitting States to fashion their own scheme o[f] warranty rights and remedies which may be more protective than the minimum level of protection of the Federal Act. . . . Thus, a State provision which merely creates consumer rights or remedies, without providing for disclosure of them, would be entirely unaffected by the Warranty Act; that is, it would not be subject to "preemption."

43 Fed. Reg. 50,737-38 (Oct. 31, 1978) (footnotes omitted). A similar view is clearly intended for the rest of the statute. *See supra* note 81.

90. *See, e.g., Chrysler v. Texas*, 755 F. 2d at 1205-06; *Chrysler Corp. v. Armstrong*, No. 83-45, slip op. at 1 (E.D. Ky. Apr. 30, 1985) (state oral hearing requirement in informal dispute settlement not preempted), cited in *Auto Importers*, 681 F. Supp. at 1378; *Auto Importers* at 1378-80.

91. The first policy is attributed to Congress under the 1914 Federal Trade Commission Act. The second is attributed to Congress through an implicit analysis that the manufacturer's interests must have been included in the "balance" necessary to pass the legislation. This is more explicit in *Motor Vehicle Mfrs. Ass'n*, 697 F. Supp. at 736, which the court cites with approval, at 1107 n.1 & 1111-12. The third policy is a mixture of the court's own policy analysis and negative inferences drawn from the

In each instance, the court focuses on the perspective of manufacturers, either emphasizing rights under an implicit balance of interests ostensibly contemplated by the statute⁹² (and the consent order itself) or the need to preserve incentives for their cooperation as a practical necessity to obtain the benefits of the statutory scheme.⁹³

The legislative history, however, reflects an "overriding intent" to "enhance consumer protections."⁹⁴ The notion "that a significant congressional purpose behind Magnuson-Moss was to convey rights to manufacturers is unsupported."⁹⁵ Thus, the U.S. District Court for Minnesota upheld an even stronger statute, mandating informal dispute resolution by manufacturers, noting that it "seeks to further the Congressional goal of protecting consumers by enhancing the protections established by Magnuson-Moss."⁹⁶

While consumer interests may arguably be enhanced by creating incentives for manufacturers to offer informal dispute settlement mechanisms as part of a written warranty (as in section 2310),⁹⁷ the instant case did not involve such a mechanism.⁹⁸ GM offered the program in dispute only *after* being cited with an FTC complaint.⁹⁹ The relief was not part of any written warranty--rather, it was a creation of the consent order.¹⁰⁰ Thus, not only is the policy of section 2310 not favored by the instant court's ruling, it is eroded by allowing the manufacturer to derive *post hoc* protection when the statute was designed to create incentives to offer such programs for the consumer's benefit *up front*.¹⁰¹

FTC's action as Congress' agent.

92. See also *Motor Vehicle Mfrs. Ass'n*, 697 F. Supp. at 736.

93. See 703 F. Supp. at 1111-13.

94. *Auto Importers*, 681 F. Supp. at 1380.

95. *Id.* at 1380 & n.10. Thus, the House Report on the legislation notes: "The purpose of this legislation is (1) to make warranties on consumer products more readily understood and enforceable, (2) to provide the Federal Trade Commission (FTC) with means of better protecting consumers, and (3) to authorize appropriations for the operations of the FTC. . . ." H.R. REP. No. 93-1107, cited in 1974 U.S. CODE CONG. & ADMIN. NEWS 7702.

96. *Auto Importers*, 681 F. Supp. at 1380.

97. 15 U.S.C. § 2310 (1982).

98. The FTC has regulations establishing minimum requirements for informal dispute settlement programs when voluntarily implemented as part of a manufacturer's written warranty under the Magnuson-Moss Act. See *Informal Dispute Settlement Procedures*, 16 C.F.R. § 703 (1983). The statutory language authorizing these regulations, however, only applies to programs initiated as part of a written warranty *prior* to the sale of the product. Compare 15 U.S.C. § 2310(a)(2)-(a)(3) with § 2302(a)(8) and (b)(1)(A).

99. GM may have had an arbitration program prior to the order. However, it apparently did not meet the Magnuson-Moss minimum standards. Commissioner Douglas of the FTC noted in his separate statement supporting the consent order that 48% of the more than 20,000 complaints filed with the BBB would not have been entitled to arbitration prior to the order, although they were apparently so entitled after the order. *General Motors*, 102 F.T.C. at 1746.

100. See *Abrams*, 703 F. Supp. at 1104-05.

101. See *supra* notes 99 and 100. Note consumers waited three years from the filing of the complaint to the entry of the consent order. (Presumably additional years were required to advance from discovery of the defect to the filing of the complaint.) Then each had to go through arbitration

The court's remaining policy concerns stem from congressional and agency desire to create and preserve incentives for consent orders¹⁰² and the desire to avoid subjecting consent defendants to a patchwork of state procedures and remedies.¹⁰³ Both beg the question of what was actually contained in the consent order at issue. If the manufacturer entered into a consent order which was not preemptive, as the FTC argues,¹⁰⁴ these policies are not directly implicated.¹⁰⁵ Indeed, there is persuasive evidence that there is no conflict between the GM/BBB procedures referenced in the consent order and state law. The manuals for arbitrators included as attachments in the consent order indicates in three different places that the procedures and rules of decision-making were subject to state law.¹⁰⁶ Thus, compliance with both the order (which incorporated rules containing this caveat) and the state law would not appear to be a physical impossibility. Thus, none of the bases for implied preemption--federal occupation of the field, obstacle to the congressional scheme, or simultaneous compliance physically impossible¹⁰⁷--is present. The "clear intent" standard is not met; the available evidence of congressional intent cuts against preemption.

The court's final concern--the flexibility, efficiency, and equity of lay arbitrators operating under a decision-making rule limited to their own concepts of fairness¹⁰⁸--becomes merely a policy issue.

before getting satisfaction or starting all over again in the courts. This runs directly counter to the key perceived benefit of informal dispute resolution: quicker settlements for consumers (a particularly urgent consideration when the family automobile is involved!).

102. As noted above, *supra* note 71, authority for the FTC to enter into consent orders was provided in the 1914 FTC Act, not the Magnuson-Moss Act. Thus, it may be argued that the congressional intent underlying the 1914 Act is the most relevant. However, Magnuson-Moss was entitled, in part, "the FTC Improvement Act." As such, it represents an expression of more contemporary congressional intent on issues surrounding that agency. Moreover, it contains specific provisions regarding informal dispute resolution and announces a congressional policy in that area. See 15 U.S.C. § 2310(a) (1982). Hence, its policies are entitled to substantial weight.

103. But uniformity would seem to be undermined by the "standardless" method of decision-making based on each individual arbitrator's sense of fairness this case requires. See *General Motors*, 102 F.T.C. at 1744 (separate statement of Commissioner Pertschuk). The result is to subject consumer plaintiffs to an even greater "patchwork" of modes of decision-making and results. See *infra* note 117.

104. See *supra* notes 28, 81, & 90. But cf. *supra* note 29 (chairman disagrees).

105. While GM may have entered into the consent order in the *mistaken* belief that the order was preemptive, ignorance of the law is no excuse. GM is chargeable with knowledge of the law and is *sophisticated enough to have known that it needed to get preemption language spelled out in the order* if that was a key bargaining point.

106. See *supra* note 68. See also *supra* notes 14 & 73. Since the federal order merely incorporates the BBB rules, which themselves defer to state law (as they would in any arbitration conducted in New York by GM without a consent order), there would seem to be no preemption. The FTC agrees with this view. But compare *Abrams*, 703 F. Supp. at 1112-13.

107. See *supra* notes 55-59.

108. See *Abrams*, 703 F. Supp. at 1111-13.

B. The Policy Issues

Under such an analysis, from a policy perspective, the court places the interests of GM and the policies of its private arbitration program (developed in conjunction with the BBB) above the interests and policies of New York, Congress, the FTC, and consumers.

The interests of states¹⁰⁹ and of the federal government in creating an effective, dual system of regulation to protect consumers from automotive "lemons" is not insubstantial. It has been estimated that automobile manufacturers produce "more than 10,000 lemons per year."¹¹⁰ Beyond its derogation of consumer interests, the decision offends process values. In essence, a single unelected federal judge has allowed the opinions and concerns of a single member of an unelected regulatory agency (Chairman Oliver) to override the will of the people's elected representatives at both the state and federal level.¹¹¹

While other courts may look at the true intent of Congress and the FTC and find ample grounds to reverse the holding of this case, the steady trend of the last decade of federal regulatory agencies once again becoming captives of the industries they regulate¹¹² suggests that the pattern at work in this case¹¹³ may recur repeatedly. Moreover, by allowing the procedural deck to be stacked, the court's holding cuts directly at the viability of using alternative dispute resolution techniques to settle manufacturer-consumer conflicts. Thus, the surest remedy for consumers and the process interests offended in this decision lies in pressure on Congress.

Congressional action might take the form of legislation explicitly declaring that such consent orders are not preemptive; or that they are preemptive only when the agency expressly includes such language in its order. Another measure worthy of consideration is federal legislation requiring informal dispute settlement mechanisms to contain consumer safeguards at least as strong as those contained

109. "[T]he vast majority of states have enacted" lemon laws. Annotation, *Validity, Construction, and Effect of State Motor Vehicle Warranty Legislation (Lemon Laws)*, 51 A.L.R.4th 872, 877 (1987).

110. "It is estimated that over one-half of the domestic and over one-third of the foreign automobiles sold in 1981 contained defects at the time they were delivered to consumers, and of these defective vehicles, 34 percent suffered recurring problems." *Id.* at 875. See also, Note, *Lemon Laws: Putting the Squeeze on Automobile Manufacturers*, 61 WASH. U.L.Q. 1125 (1984).

111. The Supreme Court in *Louisiana PSC* expressed concern with granting an agency "power to override Congress." 476 U.S. at 374-75. Here the court defers to a single member of an agency against the agency itself, as well as Congress and the state legislature of New York.

112. This factor defeats the policy at work in permitting such settlements, which assumes that the regulatory agency represents consumers. In essence, the consumer is forced to delegate his fate to an agent whose sympathies lie with his adversary. This is starkly evident in the instant case, in which "over 70%" of the hundreds of consumers who commented to the FTC opposed the arbitration agreement, while only 14% supported it. See *General Motors*, 102 F.T.C. at 1743 (separate statement of Commissioner Pertschuk).

113. That is: an industry gets a favorable ruling from a sympathetic agency to preempt the action of states more interested in protecting consumer rights.

in New York's Lemon Law.¹¹⁴ A national debate on the latter alternative would have the added virtue of flushing out evidence on the relative merits of different forms and forums for informal dispute resolution.¹¹⁵

Only through action by elected representatives can the "balance of interests"¹¹⁶ which the instant court sees as the objective of the Magnuson-Moss¹¹⁷ and FTC¹¹⁸ Acts be restored. Until then, consumers may wonder whether decisions such as *General Motors v. Abrams* herald a return to the days when public policymakers unabashedly proclaimed, "What's good for General Motors is good for the country!"¹¹⁹

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114. N.Y. GEN. BUS. LAW § 198-a (McKinney 1988).

115. Note the court in this case seems to believe the flexibility, efficiency, and equity of the GM/BBB scheme are preferable to those of New York's Lemon Law. See *Abrams*, 703 F. Supp. at 1111-13. However, it cites no evidence to support this view.

It may be argued with equal or greater conviction (as it was successfully by elected representatives in the New York legislature) that the qualities of professionalism (via training), consistency (via the use of actual law), and equity (use of laws created by majority will rather than the gut instinct of a single volunteer from the community) present in the New York scheme are superior.

Thus, a letter to the FTC signed by 29 state attorneys general noted that under the scheme adopted by the court, "similarly situated consumers could get a whole loaf, half a loaf or no loaf at all. Arbitrary arbitrations are not the answer to resolving this case." *General Motors*, 102 F.T.C. at 1743 (separate statement of Commissioner Pertschuk).

116. See also *Motor Vehicle Mfrs. Ass'n*, 697 F. Supp. at 727.

117. 15 U.S.C. §§ 2301-2312 (1982).

118. See *Russo v. Texaco, Inc.*, 630 F. Supp. 682, 684-85 (E.D.N.Y.), *aff'd*, 808 F.2d 221 (2d Cir. 1986), cited in *Abrams*, 703 F. Supp. at 1104. See also *supra* note 71.

119. Charles Erwin Wilson, *Testimony Before the Senate Armed Services Committee*, 1952; cited in BARTLETT, *FAMILIAR QUOTATIONS* 817 (15th ed. 1980).

