

Alternative Dispute Resolution Under Ohio's Lemon Laws: A Critical Analysis

I. INTRODUCTION

To most Americans, the purchase of a new vehicle is second only to the purchase of a new home in terms of both price and excitement. If the purchaser realizes, after only a few days of operation, that he has purchased an inoperable or dangerously defective automobile, this important purchase becomes a nightmare. He has purchased what has universally become known as a "lemon." All the excitement associated with the purchase of a new car or truck is completely soured. The purchaser is then faced with the seemingly insurmountable task of seeking redress from a faceless manufacturer and a dealer's uncooperative service department. Unsatisfied and frustrated, the purchaser, if not completely discouraged, retains an attorney in order to execute the gymnastic legal feats required by the Uniform Commercial Code (U.C.C.). Then, after a few years of expensive litigation, the persistent consumer, by now completely disgusted with car dealers, manufacturers, attorneys, and the entire legal system, perhaps breaks even, having gained only minimal satisfaction and the desire to avoid any future car purchases.

The United States Congress addressed the purchasers' plight in 1974 by enacting the Magnuson-Moss Warranty-Federal Trade Commission Act (Magnuson-Moss).¹ Magnuson-Moss requires manufacturers that offer written warranties to clearly label their warranties as either full or limited and to simply and plainly explain the scope of the warranties. Unfortunately, because the requirements placed upon the

1. Pub. L. No. 93-637, § 101, 88 Stat. 2183 (codified as amended at 15 U.S.C. §§ 2301-2312 (1988)). The Act requires that the manufacturer conspicuously label its warranty as either a full or a limited warranty. 15 U.S.C. § 2303(a) (1988). If it opts to give a full warranty, the manufacturer must refund the purchase price or replace the vehicle after a reasonable number of repair attempts. *Id.* § 2304(a)(4). If it opts to give a limited warranty, the manufacturer decides for itself which parts will be warranted and the duration of the warranty.

manufacturers opting to offer a full warranty are so stringent,² most manufacturers then began offering only limited warranties.³

Once the inadequacies of Magnuson-Moss and the Uniform Commercial Code remedies became apparent, the Ohio General Assembly joined the rest of the nation⁴ in 1987 by enacting its own lemon law.⁵ However, instead of merely providing an additional theory of liability for the litigant consumer to place in its quiver alongside warranty, contract, fraud, and Magnuson-Moss, the Ohio General Assembly purportedly also provided a more accessible remedy by including provisions for manufacturers' informal dispute resolution mechanisms.⁶ This Note will

2. See 15 U.S.C. § 2304(a). This subsection requires a manufacturer to refund the purchase price or to replace the vehicle after a reasonable number of repair attempts if the vehicle is covered by a full warranty.

3. Congress enacted Magnuson-Moss in 1974, and by 1979, nearly 99% of all new cars were sold with limited warranties. R. Coffinberger and L. Samuels, *Legislative Responses to the Plight of the New Car Purchasers*, 18 U.C.C. L.J. 168, 172 (1985).

4. Nearly all the states and the District of Columbia have enacted their own versions of lemon laws. See ALASKA STAT. §§ 45.45.300-360 (1990); ARIZ. REV. STAT. ANN. §§ 44-1261 to -1265 (1987 & Supp. 1990); CAL. CIV. CODE § 1793.2 (Deering 1990); COLO. REV. STAT. §§ 42-12-101 to -107 (1984 & Supp. 1990); CONN. GEN. STAT. ANN. § 42-179 (West Supp. 1990); DEL. CODE ANN. tit. 6, §§ 5001-5009 (Supp. 1990); D.C. CODE ANN. §§ 40-1301 to -1309 (1990); FLA. STAT. §§ 681.10-.111 (1990); HAW. REV. STAT. § 490:2-313.1 (Supp. 1989); ILL. REV. STAT. ch. 121 1/2, para. 1201-1208 (1988); IOWA CODE § 322E.1 (1989); KAN. STAT. ANN. § 8-2419 (1985); KY. REV. STAT. ANN. §§ 367.840-.846 (Baldwin 1987); LA. REV. STAT. ANN. §§ 51:1941-1948 (West 1987); ME. REV. STAT. ANN. tit. 10, §§ 1161-1169 (Supp. 1990); MD. COM. LAW CODE ANN. §§ 14-1501 to -1504 (1990); MASS. ANN. LAWS ch. 90, § 7N1/2 (Law. Co-op 1985 & Supp. 1990); MICH. COMP. LAWS §§ 257.1401-.1410 (1990); MINN. STAT. § 325F.665 (1990); MISS. CODE ANN. §§ 63-17-151 to -165 (1990); MO. REV. STAT. §§ 407.560-.579 (1989); MONT. CODE ANN. §§ 61-4-501 to -533 (1989); NEB. REV. STAT. §§ 60-2701 to -2709 (1988); NEV. REV. STAT. §§ 598-751 to -791 (1985); N.H. REV. STAT. ANN. §§ 357-D:1 to :8 (1984 & Supp. 1990); N.M. STAT. ANN. §§ 57-16A-1 to -9 (1987); N.Y. GEN. BUS. LAW § 198-a (McKinney 1988 & Supp. 1991); N.D. CENT. CODE §§ 51-07-16 to -22 (1989); OKLA. STAT. ANN. tit. 15, § 901 (West Supp. 1991); OR. REV. STAT. §§ 646.315-.375 (1985); PA. STAT. ANN. tit. 73, §§ 1951-1963 (Purdon Supp. 1990); R.I. GEN. LAWS §§ 31-5.2-1 to -13 (Supp. 1990); TENN. CODE ANN. §§ 55-24-201 to -211 (1988); TEX. REV. CIV. STAT. ANN. art. 4413(36) (Vernon Supp. 1991); UTAH CODE ANN. §§ 13-20-1 to -7 (1986 & Supp. 1990); VT. STAT. ANN. tit. 9, §§ 4170-4181 (1984 & Supp. 1990); VA. CODE ANN. §§ 59.1-207.9 to -.14 (1987 & Supp. 1990); WASH. REV. CODE §§ 19.118.005-.902 (Supp. 1988); W.VA. CODE §§ 46A-6A-1 to -9 (1986 & Supp. 1990); WIS. STAT. § 218.015 (1988); WYO. STAT. § 40-17-101 (Supp. 1990).

5. 1987 Ohio Legis. Serv. 232 (Baldwin) (codified at OHIO REV. CODE ANN. §§ 1345.71-.77 (Anderson Supp. 1988)).

6. OHIO REV. CODE ANN. § 1345.77. This section provides as follows:

(A) The attorney general shall adopt rules for the establishment and qualification of an informal dispute resolution mechanism to provide for the resolution of warranty disputes between the consumer and the manufacturer, its agent, or its authorized dealer. The mechanism shall be under the supervision of the division of consumer protection of the office of the attorney general and shall meet or exceed the minimum requirements for an informal dispute resolution mechanism as provided by the "Magnuson-Moss Warranty Federal Trade Commission Improvement Act," 88 Stat. 2183, 15 U.S.C. 2301, and regulations adopted thereunder.

(B) If a qualified informal dispute resolution mechanism exists and the consumer receives timely notification, in writing, of the availability of the mechanism with a description of its operation and effect, the cause of action under section 1345.75 of

examine the operation of these dispute resolution mechanisms and, specifically, will determine whether they indeed provide a more expedient, accessible means to obtain relief, or instead, merely constitute an additional, technical condition precedent to civil commercial litigation.

II. OHIO'S LEMON LAW AND THE DISPUTE RESOLUTION MECHANISM PROVISIONS

To understand the scope of the lemon laws, it is important to understand which transactions trigger lemon laws. Ohio Revised Code section 1345.72 provides:

If a new motor vehicle does not conform to any applicable express warranty and the consumer reports the nonconformity to the manufacturer, its agent, or its authorized dealer during the period of one year following the date of original delivery or during the first eighteen thousand miles of operation, whichever is earlier, the manufacturer, its agent, or its authorized dealer shall make any repairs as are necessary to conform the vehicle to such express warranty, notwithstanding the fact that the repairs are made after the expiration of the appropriate time period.⁷

Therefore, the vehicle must be new; owners of used cars are not entitled to the protection of the lemon laws. Furthermore, the term "motor vehicles" includes only passenger cars or noncommercial vehicles; a vehicle other than a passenger car must be used exclusively for purposes other than engaging in business for profit for the lemon laws to apply.⁸ In addition, the vehicle must carry with it a written express warranty,⁹ and the vehicle must in some way not conform to the warranty. A nonconformity is "any defect or condition which substantially impairs the use, value, or safety of a motor vehicle and does not conform to the express warranty of the manufacturer or distributor."¹⁰ The vehicle must

the Revised Code may not be asserted by the consumer until after the consumer has initially resorted to the informal dispute resolution mechanism. If such a mechanism does not exist, if the consumer is dissatisfied with the decision produced by the mechanism, or if the manufacturer, its agent, or its authorized dealer fails to promptly fulfill the terms determined by the mechanism, the consumer may assert a cause of action under section 1345.75 of the Revised Code.

(C) Any violation of a rule adopted pursuant to division (A) of this section is an unfair and deceptive act or practice as defined by section 1345.02 of the Revised Code.

7. *Id.* § 1345.72(A).

8. *Id.* § 1345.71(D). See also OHIO REV. CODE ANN. § 4501.01(H) (Anderson 1990).

9. "'Express warranty' and 'warranty' mean the written warranty of the manufacturer or distributor of a new motor vehicle concerning the condition and fitness for use of the vehicle, including any terms or conditions precedent to the enforcement of obligations under the warranty." OHIO REV. CODE ANN. § 1345.71(C) (Anderson Supp. 1988).

10. *Id.* § 1345.71(E).

have accumulated less than eighteen thousand miles or be less than one year old, and if there is a nonconformity, the consumer must report this nonconformity to the manufacturer, its agent, or its authorized dealer.

If the consumer purchased a vehicle that does not conform to the vehicle's express warranty, the manufacturer has the duty to repair the vehicle so that it conforms to the warranty.¹¹ Then, if the manufacturer or dealer is unable to conform the vehicle to the express warranty after a reasonable number of repair attempts,¹² the consumer has the option to receive a new, acceptable, conforming motor vehicle or, instead, to receive all of the following:

1. The full purchase price, including, but not limited to, charges for undercoating, transportation, and installed options;
2. [a]ll collateral charges, including but not limited to, sales tax, license and registration fees, and similar government charges;
3. [a]ll finance charges incurred by the consumer; [and]
4. [a]ll incidental damages, including any reasonable fees charged by the lender for making or cancelling the loan.¹³

In light of the severity of the sanctions imposed, a dealer or manufacturer is unlikely to voluntarily admit that the vehicle is defective. Instead, a dispute between the consumer and the dealer is likely to arise, and it is at this point that the overwhelmed consumer seeks support in the remedial measures provided by the lemon laws.

Besides providing an alternative dispute resolution mechanism, the lemon laws also facilitate private suits brought by complaining consumers.

11. *Id.* § 1345.72(A).

12. Ohio Revised Code § 1345.73 defines "a reasonable number of repair attempts" as follows:

It shall be presumed that a reasonable number of attempts have been undertaken by the manufacturer, its dealer, or its authorized agent to conform a motor vehicle to any applicable express warranty if, during the period of one year following the date of original delivery or during the first eighteen thousand miles of operation, whichever is earlier, any of the following apply:

(A) Substantially the same nonconformity has been subject to repair three or more times and continues to exist;

(B) The vehicle is out of service by reason of repair for a cumulative total of thirty or more calendar days;

(C) There have been eight or more attempts to repair any nonconformity that substantially impairs the use and value of the motor vehicle to the consumer;

(D) There has been at least one attempt to repair a nonconformity that results in a condition that is likely to cause death or serious bodily injury if the vehicle is driven, and the nonconformity continues to exist.

OHIO REV. CODE ANN. § 1345.73 (Anderson Supp. 1988).

In addition, the civil remedies provided in this section are not exclusive. *Id.* § 1345.75(B).

13. *Id.* § 1345.72(B).

If a new car purchaser suffers any loss due to the car's nonconformity as a result of the manufacturer's or dealer's failure to repair or replace the vehicle or to refund the purchase price, then the purchaser may bring a civil suit in a common pleas court and may be entitled to attorney's fees and all court costs.¹⁴ The statute requires any civil suit to be commenced within two years of the expiration of the dealer's express warranty, but this period of limitation is suspended beginning on the date that the purchaser files a complaint with a qualified informal dispute resolution mechanism and ending on the date of a decision by that mechanism.¹⁵ If the consumer receives timely, written notification from the manufacturer that a qualified informal dispute resolution mechanism exists, the consumer must resort to the manufacturer's qualified alternative dispute resolution mechanism before filing a civil lawsuit.¹⁶ As a practical matter, the existence of a manufacturer's dispute resolution mechanism is not a condition precedent to an ordinary civil lawsuit in Ohio because only one manufacturer, Toyota, has had its mechanism formally qualified by the Ohio Attorney General.¹⁷

Subsection A of section 1345.77 requires the Ohio Attorney General to adopt rules for the establishment and qualification of manufacturer dispute resolution mechanisms to provide for the resolution of warranty disputes between the consumer and the manufacturer, its agent, or its dealer.¹⁸ The consumer protection division of the Attorney General's office must supervise the manufacturers' mechanisms,¹⁹ and each mechanism, to be qualified, must meet or exceed the minimum requirements for an informal dispute resolution mechanism as provided by Magnuson-Moss and its parallel regulations.²⁰ Pursuant to this statutory mandate, the Ohio Attorney General promulgated Ohio Administrative Code Chapters 109:4-4 and 109:4-5 on November 29, 1987,²¹ describing the requirements of a dispute resolution mechanism entitled to certification by the Attorney General.

Chapter 109:4-4 requires the manufacturer to fulfill a laundry list of qualifications in order to have its dispute resolution mechanism certified. Importantly, neither the statutes nor the Administrative Code initially requires the manufacturer to create and maintain a certifiable

14. *Id.* § 1345.75(A).

15. *Id.* § 1345.75(C).

16. *Id.* § 1345.77(B).

17. Telephone interview with Theodore Barrows, Esq., Assistant Ohio Attorney General, Consumer Protection Division (Mar. 4, 1991).

18. OHIO REV. CODE ANN. § 1345.77(A) (Anderson Supp. 1988).

19. *Id.*

20. *Id.*

21. OHIO ADMIN. CODE §§ 109:4-4-01 to :4-5-06 (1988).

dispute resolution mechanism. However, to be certified, the Administrative Code first requires that the manufacturer meet certain notice requirements. Specifically, the manufacturer must conspicuously notify the consumer of the mechanism's availability,²² its name,²³ address,²⁴ telephone number,²⁵ and that the consumer must first resort to the mechanism before initiating civil litigation.²⁶ The manufacturer is also required to outline in the warranty packet all pertinent details concerning the dispute resolution mechanism,²⁷ and it must designate a contact person accessible to the consumer.²⁸ In addition, the manufacturer must respond promptly to information requests,²⁹ and upon notification of a mechanism's decision, must in good faith perform the obligations required by that decision.³⁰

The mechanism itself must be funded and competently staffed "at a level sufficient to ensure fair and expeditious resolution of all disputes, and shall not charge consumers any fee for [its] use."³¹ In addition, although the manufacturer provides the arbitrators' salaries, the chapter requires that the arbitrators be sufficiently insulated to eliminate any improper influence by the manufacturer.³² The chapter also proscribes arbitrator involvement or interest in a dispute, and no arbitrator may have any direct involvement in the manufacture, distribution, sale, or service of any motor vehicle.³³

Procedurally, the chapter requires the manufacturer to promulgate written procedures for its mechanism, which are to be made available upon request.³⁴ In addition, immediately upon receipt of written notification of a warranty dispute, the mechanism must notify the consumer in writing that she must comply with the mechanism's procedures before pursuing civil litigation.³⁵ The mechanism then becomes an investigative body and gathers its own evidence, while providing both parties with the opportunity to submit materials as

22. *Id.* § 109:4-4-03(C)(1).

23. *Id.* § 109:4-4-03(C)(2).

24. *Id.*

25. *Id.*

26. *Id.* § 109:4-4-03(C)(3).

27. *Id.* § 109:4-4-03(D).

28. *Id.* § 109:4-4-03(F)(1).

29. *Id.* § 109:4-4-03(F)(2).

30. *Id.* § 109:4-4-03(F)(3).

31. *Id.* § 109:4-4-04(A)(1).

32. *Id.* § 109:4-4-04(A)(2).

33. *Id.* § 109:4-4-04(B)(1).

34. *Id.* § 109:4-4-04(C)(1).

35. *Id.* § 109:4-4-04(C)(2).

evidence.³⁶ A consumer may, upon request, appear in person before the board.³⁷ The mechanism has sixty days in which to render a decision as to liability and remedies in the form of a detailed opinion.³⁸ Furthermore, the chapter requires that a mechanism keep detailed records of the disputes filed, resolved, settled, left unresolved, and ignored by the manufacturer.³⁹ These statistics must be filed twice a year with the Attorney General.⁴⁰

III. ANALYSIS

The alternative dispute resolution mechanism provisions contained in the Ohio Revised Code and the Ohio Administrative Codes represent toothless directives to the new car manufacturer to establish a thorough and expedient decision-making body to which the consumer may comfortably resort and expect a fair and impartial resolution of warranty dispute. While the Ohio General Assembly intended to provide more than another theory of liability for the consumer, the provisions concerning a manufacturer's alternative dispute resolution mechanism, while facially demanding, require very little, if anything, of the manufacturer.

Certainly, the Revised Code required the Ohio Attorney General to adopt Chapters 109:4-4 and 109:4-5 of the Ohio Administrative Code as rules for the qualification and certification of the manufacturer's dispute resolution mechanism.⁴¹ The rules subsequently promulgated did indeed erect stringent requirements to certify an alternative dispute resolution mechanism for resolving warranty disputes. However, because neither the Revised Code nor the Administrative Code requires that a manufacturer actually upgrade its mechanism in order to meet the Code's requirements, the manufacturer has no legal or practical incentive to install a mechanism. This is not only obvious from the Code, but also from the fact that, in the three years during which the provisions have been in effect, only one major manufacturer, Toyota, has actually sought and received attorney general certification for its mechanism, and that certification was granted only as recently as September 1989.⁴² No other manufacturer has even hinted at the possibility of upgrading its mechanism to meet the Code's requirements, and upon criticism, the manufacturers justifiably respond with the smug rhetorical, "Why should we?" The

36. *Id.* § 109:4-4-04(C)(3).

37. *Id.*

38. *Id.* § 109:4-4-04(C)(5).

39. *Id.* § 109:4-4-04(C)(6).

40. *Id.* § 109:4-4-04(D)(5).

41. OHIO REV. CODE ANN. § 1345.77(A) (Anderson Supp. 1988).

42. Telephone interview with Theodore Barrow, Esq., *supra* note 17.

manufacturers have read the statutes and the regulations, and they obviously understand what they do and do not require.

Indeed, the informal dispute resolution provisions are so stringent in terms of staffing,⁴³ compensation,⁴⁴ notice to consumers,⁴⁵ reporting,⁴⁶ and speed,⁴⁷ that the manufacturer has incentive to avoid seeking Attorney General qualification. The manufacturer perceives the costs directly associated with upgrading as clearly outweighing the benefits of having its mechanism qualified by the Attorney General. Additionally, the Attorney General's rules provide a number of obstacles through which the manufacturer is required to navigate. If it fails to navigate these obstacles and violates any of the rules, the violation is an unfair and deceptive act or practice, which renders the manufacturer liable to the consumer for treble damages and attorney's fees.⁴⁸

The objectionable aspect of the alternative dispute resolution mechanism provisions is not their stringency; indeed, the Attorney General's rules adequately strike a balance between the rights of the consumer and the rights of the manufacturer. What is objectionable is that the General Assembly places the applicability of the rules within the discretion of the individual manufacturer. The rules are permissive, not mandatory. Consequently, the manufacturer doing business with Ohio consumers has resoundingly responded to the General Assembly's invitation by avoiding the stringent rules.

Even though manufacturers are not required to certify their programs with the Attorney General, and consequently their dispute resolution bodies need not meet the standards of the Administrative Code or the Magnuson-Moss regulations, the consumer may still use the manufacturer's programs. The consumer may or may not receive a satisfactory result. Importantly, the unsatisfied purchaser must be wary of the pitfall inherent within the lemon law's statute of limitations. Subsection C of Ohio Revised Code section 1345.75 provides that a litigant must bring a lemon law suit within two years of the expiration of the express warranty term.⁴⁹ The subsection provides further that, if a litigant first files a complaint with an alternative dispute resolution mechanism qualified pursuant to section 1345.77, the two-year statute of limitations period is suspended from the date of that filing until the date of

43. OHIO ADMIN. CODE § 109:4-4-04(A) (1988).

44. *Id.*

45. *Id.* § 109:4-4-04(C).

46. *Id.* § 109:4-4-04(D)(5).

47. *Id.* § 109:4-4-04(C)(5).

48. OHIO REV. CODE ANN. § 1345.77(C) (Anderson Supp. 1988).

49. *Id.* § 1345.75(C).

a decision by the mechanism.⁵⁰ As noted earlier, only Toyota has an alternative dispute resolution mechanism that has been qualified by the Attorney General pursuant to section 1345.77.⁵¹ Therefore, filing complaints with the Ford, General Motors, Chrysler, or Volkswagen dispute resolution mechanisms does not toll the two-year statute of limitations. Instead, the statutory period continues to run while the complaint is pending.

IV. RECOMMENDATION

The provisions in the Ohio statute relating to a manufacturer's alternative dispute resolution mechanism are inadequate to strike a realistic balance between the legal rights of the purchaser and the manufacturer and dealer. The provisions have a considerable bite and stringently require the manufacturer, once it qualifies its mechanism, to provide a considerable number of procedural protections in order to provide the consumer with an accessible, fair, insulated, and expedient forum in which to resolve automobile warranty disputes. However, by virtue of the simple fact that the manufacturer is in no way required to meet the provisions of Chapters 109:4-4 and 109:4-5 of the Ohio Administrative Code, those articulated requirements are worthless.

Ohio's lemon law should require automobile manufacturers doing business in Ohio to qualify their alternative dispute resolution mechanisms pursuant to section 1345.77 of the Revised Code and pursuant to Chapters 109:4-4 and 109:4-5 of the Administrative Code. Then, resort to a manufacturer's alternative dispute resolution mechanism would be a truly worthwhile means of avoiding the cost, technicalities, and burdens of commercial civil litigation and not merely a distraction for the purchaser unknowingly destined for the courtroom.

In addition, or in the alternative, Ohio should enact an additional section or subsection to its lemon law that would establish a state-operated, mandatory arbitration program. The statute should require the Attorney General to promulgate additional implementing regulations to be contained in the Ohio Administrative Code for the creation and operation of the program. The statute itself should provide the consumer and the manufacturer with the option of resorting to the program, but if either party opts to do so, the other would be required to subject itself to the program's jurisdiction. Results should be binding but appealable to a common pleas court within a short period of time by either dissatisfied party.

50. *Id.*

51. Telephone interview with Theodore Barrows, Esq., *supra* note 17.

Such a state-operated arbitration program is by no means a novel notion. Seven other states, after being faced with a situation similar to Ohio's, have opted to shift the base of authority over alternative resolution of warranty disputes from the manufacturer to the state.⁵² For example, the initial Massachusetts lemon law went into effect in January 1984 with substantive provisions nearly identical to Ohio's in terms of standards for the refund or replacement of seriously defective new motor vehicles.⁵³ The law as originally enacted also contained voluntary provisions for manufacturer arbitration of lemon law claims,⁵⁴ very similar to Ohio's. However, when no manufacturer participated in the voluntary program, Massachusetts amended its law in 1985 to provide for a mandatory, state-run arbitration program, the Massachusetts Lemon Law Arbitration Program (LLAP), which became operational on April 23, 1986.⁵⁵ Massachusetts became one of the first states to provide its consumers with state-run arbitration of lemon law disputes.⁵⁶

Specifically, an office similar to Ohio's consumer protection division of the attorney general's office, the Massachusetts Executive Office of Consumer Affairs and Business Regulation (EOCABR), administers the Massachusetts program.⁵⁷ The Massachusetts statute, as amended, requires the EOCABR to contract with a professional arbitration firm to conduct arbitration hearings.⁵⁸ Since 1986, the office has solicited bids for the contract and chosen the American Arbitration Association (AAA), a professional, nonprofit arbitration association.⁵⁹ The AAA schedules arbitration hearings and provides a pool of over 300 trained arbitrators thoroughly versed in the substantive statutory requirements of Massachusetts' lemon law.⁶⁰

Statistically, arbitrators operating within Massachusetts' state-run arbitration program decided in favor of consumers in nearly two-thirds of the cases heard through 1987, the last year for which statistics are available.⁶¹ Consumers have received more than \$3.2 million in refunds

52. Connecticut, the District of Columbia, Massachusetts, New York, Texas, Vermont, and Washington all have state-run arbitration programs. Abrams, *New York Lemon Law Arbitration Program: Annual Report - 1987*, ARB. J., Sept. 1988, at 36, 38, n.1.

53. MASS. ANN. LAWS, ch. 90, § 7N1/2 (Law. Co-op. 1985) (amended 1985).

54. *Id.*

55. MASS. ANN. LAWS, ch. 90, § 7N1/2 (Law. Co-op. Supp. 1990). See Gold, *Massachusetts Lemon Law Arbitration Program: 1987 Report*, ARB. J., Sept. 1988, at 48, 49.

56. Gold, *supra* note 55, at 48.

57. *Id.*

58. MASS. ANN. LAWS, ch. 90 § 7N1/2 (Law. Co-op. 1985 & Supp. 1990); Gold, *supra* note 55, at 53.

59. Gold, *supra* note 55, at 53.

60. *Id.*

61. *Id.*

and replacements since the program began and \$1.9 million in 1987 alone.⁶² After the creation and implementation of the Massachusetts program, the number of complaints filed against manufacturers rose dramatically, but since 1987, they have leveled off. In addition, the reaction of manufacturers doing business in Massachusetts has shifted markedly, as indicated by the fact that, in 1987, the percentage of cases settled prior to arbitration more than doubled.⁶³

In 1986, the state of New York implemented both of this Note's recommendations. In 1983, New York enacted its lemon law with substantive provisions similar to Ohio's and with nearly identical provisions for manufacturers' alternative dispute resolution mechanisms.⁶⁴ However, almost immediately, the New York Attorney General's office was flooded with complaints detailing the inadequacies of individual manufacturers' alternative dispute resolution mechanisms,⁶⁵ and, in response, that office conducted an in-depth analysis of the manufacturers' mechanisms.⁶⁶ It concluded that most of the mechanisms did not comply with the Magnuson-Moss provisions, its parallel Federal Trade Commission (FTC) regulations, and with many of the procedural requirements essential to a fair and expedient arbitration hearing.⁶⁷ Specifically, the manufacturers did not permit the consumers to appear before the boards, and most of the manufacturer-provided arbitrators did not correctly apply New York's substantive lemon law provisions.⁶⁸

Based upon these findings of inadequacy, New York amended its lemon law in 1986.⁶⁹ While the 1986 amendments do not go so far as to require manufacturers doing business in New York to meet the Magnuson-Moss requirements, the amendments do require that, if a manufacturer creates an alternative warranty dispute resolution mechanism, the manufacturer must meet the lemon law provisions, and therefore, must meet the Magnuson-Moss requirements.⁷⁰

More importantly, New York amended its lemon law to become almost identical to Massachusetts' in that the law now affords the consumer the option of submitting lemon law disputes to a new alternative arbitration mechanism established pursuant to regulations of the New York

62. *Id.*

63. *Id.*

64. N.Y. GEN. BUS. LAW § 198-a (amended 1986).

65. Abrams, *supra* note 52, at 38.

66. *Id.*

67. *Id.*

68. *Id.*

69. N.Y. GEN. BUS. LAW § 198-a (McKinney 1988 & Supp. 1991). *See* Abrams, *supra* note 52, at 38.

70. N.Y. GEN. BUS. LAW § 198-a (McKinney 1988 & Supp. 1991).

Attorney General's office.⁷¹ Pursuant to the amendments, if the consumer opts to resort to the state-run arbitration program, once the consumer submits its filing fee, the manufacturer is automatically amenable to the program's jurisdiction.⁷² Again, as in Massachusetts, the American Arbitration Association (AAA) was designated as program administrator and has nearly 600 arbitrators available for the resolution of automobile warranty disputes pursuant to the New York lemon law.⁷³ As suggested in this Note, the decision by an arbitrator in New York is binding upon both parties, but is subject to judicial review pursuant to New York's rules of civil practice.⁷⁴

It should be noted that both types of the New York alternative dispute resolution mechanisms have been subject to constitutional attack, and the Ohio General Assembly should act carefully if it chooses to laterally adopt New York's provisions verbatim. Specifically, in *Motor Vehicle Manufacturers Association of America, Inc. v. New York*,⁷⁵ a plaintiff trade association brought a declaratory judgment action alleging that the arbitration mechanism of the 1986 New York lemon law amendments was unconstitutional on the grounds that a compulsory arbitration program deprived the manufacturer of its constitutional right to a jury trial,⁷⁶ that the program denied access to the jurisdiction of a New York supreme court,⁷⁷ and that the program also constituted an unconstitutional delegation of judicial authority.⁷⁸ All three contentions were ruled meritless.⁷⁹ The New York court found first that a lemon law dispute is equitable in nature in that it is mainly an action for restitution, and therefore, there is no constitutional right to a jury trial.⁸⁰

Secondly, the court held that there is no constitutional right of access to the civil courts and that the legislature may establish alternative dispute resolution mechanisms.⁸¹ Lastly, the court found that, in light of the preserved high level of judicial supervision of the program, the legislature did not unconstitutionally abdicate judicial responsibility.⁸²

71. *Id.* § 198-a(k).

72. *Id.*

73. Abrams, *supra* note 52, at 39.

74. N.Y. GEN. BUS. LAW § 198-a (McKinney 1988 & Supp. 1991).

75. 146 A.D.2d 212, 540 N.Y.S.2d 888 (App. Div. 1989).

76. *Id.* at 216, 540 N.Y.S.2d 888, 890 (App. Div. 1989).

77. *Id.* at 218, 540 N.Y.S.2d 88, 891 (App. Div. 1989).

78. *Id.* at 219, 540 N.Y.S.2d 888, 892 (App. Div. 1989).

79. *Id.* at 220-21, 540 N.Y.S.2d 888, 892 (App. Div. 1989).

80. *Id.* at 216, 540 N.Y.S.2d 888, 890 (App. Div. 1989).

81. *Id.* at 218, 540 N.Y.S.2d 888, 891 (App. Div. 1989).

82. *Id.* at 219, 540 N.Y.S.2d 888, 892 (App. Div. 1989).

In another notable challenge, a plaintiff manufacturer in *Motor Vehicle Manufacturer's Association of the United States, Inc. v. Abrams*,⁸³ filed an action for declaratory relief on the ground that an FTC negotiated consent order preempted the New York lemon law compulsory arbitration provisions. The consent order forced General Motors to implement a third-party arbitration program to settle complaints of individual owners relating to certain parts of General Motors vehicles.⁸⁴ The District Court held that the consent order preempted the state's lemon law arbitration provisions in so far as a consumer attempts to trigger the provisions to settle a dispute concerning parts covered by the consent decree.⁸⁵ On appeal, the Second Circuit reversed and held that the Magnuson-Moss Warranty Act and the applicable FTC Regulations do not preempt the New York laws concerning informal dispute resolution mechanisms.⁸⁶

With the above considerations in mind, Ohio should join the other seven jurisdictions with state-run lemon law arbitration programs. Otherwise, the Ohio consumer may use the lemon law only as an alternate theory of liability in civil commercial litigation, an endeavor too costly for most consumers. The lemon law should provide more than an alternate theory of liability. It should also provide the consumer with an accessible, fair, and expedient forum that actually applies the substantive provisions of the lemon law. Currently, the Ohio lemon law provides only an additional remedy, and until it is revised to provide access to a simple dispute resolution procedure as well, the consumer is still at a disadvantage.

D. Lewis Clark, Jr.

83. 697 F. Supp. 726 (S.D.N.Y. 1988), *rev'd*, 899 F.2d 1315 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1122 (1991).

84. *Id.* at 728-29.

85. *Id.*

86. *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. Abrams*, 899 F.2d 1315 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1122 (1991).

