

6th Circ. Preemption Ruling Adds Uncertainty For Car Cos.

By **Justin Savage, Peter Whitfield and Aaron Flyer** (October 11, 2024)

Auto manufacturers and suppliers need uniformity under the law to create sufficient scale and viable markets, a policy that U.S. law for the most part aims to achieve.

Unfortunately, the U.S. Court of Appeals for the Sixth Circuit's Aug. 21 decision in *Fenner v. General Motors LLC* injects uncertainty and complexity regarding the preemption of state law consumer claims related to alleged violations of federal standards on emissions and fuel economy from motor vehicles.

On one hand, claims related to emissions performance are not preempted by the Clean Air Act. On the other hand, claims related to fuel economy performance are preempted by the Energy Policy and Conservation Act.

Given the inextricable ties between emissions and fuel economy performance, future cases will need to determine the proper line to draw in determining when state law claims survive preemption.

In drawing those lines, courts should keep in mind the potential uncertainty that will result from patchwork state-by-state standards, which may undermine a robust U.S. market for the auto industry.

In *Fenner v. GM*, a panel of the Sixth Circuit, in a 2-1 split decision, reversed the U.S. District Court for the Eastern District of Michigan and allowed state law consumer claims to proceed against General Motors and Robert Bosch GmbH related to the advertisement of Duramax diesel pickup trucks as "clean diesel."^[1]

The Sixth Circuit held that these consumer claims are not preempted by the Clean Air Act. In doing so, the court distinguished a recent opinion from the circuit in *Ford Motor Co. F-150 and Ranger Truck Fuel Economy Marketing and Sales Practices Litigation*, which held that consumer claims related to statements surrounding fuel economy performance were preempted by the Energy Policy and Conservation Act.

The *Fenner* court went to great lengths to distinguish *Ford*, ultimately viewing *Fenner* as a "fraud on the consumer" case, premised on alleged misstatements by General Motors to consumers, entirely separate from its testing and certification of the trucks pursuant to U.S. Environmental Protection Agency regulations. The court found that *Ford*, in contrast, was a "fraud on the regulator" case, based on alleged misstatements to the EPA directly.

However, the line between these types of fraud may be opaque and subjective. Both arguments implicate compliance with EPA regulations — and the Sixth Circuit's distinction between the two may generate uncertainty around when varying state consumer protection laws apply, as compared to uniform federal standards on fuel economy and emissions.

Procedural Background



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The recent Fenner decision follows years of litigation and consolidation of similar claims from across the country.[2]

An initial round of cases commenced in 2017.[3] The lead plaintiffs' law firm tested certain models of GM diesel pickup trucks equipped with Duramax engines, and alleged that they failed to conform to emissions standards under certain conditions.[4]

In 2018, the district court denied GM's motion to dismiss, holding that the claims were not preempted by the Clean Air Act, and that the plaintiffs had sufficiently established standing to sue under the Racketeer Influenced and Corrupt Organizations Act.[5] Additional plaintiffs filed similar lawsuits following that ruling, and the cases were consolidated.[6]

In 2023, while the district court was considering summary judgment motions, the Sixth Circuit decided Ford.[7] The district court immediately took note, calling Ford "substantially similar," and directed the Fenner plaintiffs to show cause as to why all of the claims should not be dismissed on the basis that Ford also controlled the CAA preemption question.[8]

Following additional briefing, the district court granted summary judgment to the defendants.[9] The court held first that the CAA preempted state-law emissions claims, and second that the plaintiffs lacked RICO standing because they were indirect purchasers.[10] The plaintiffs appealed.

The Sixth Circuit's Holding

The Sixth Circuit reversed the preemption holding and affirmed the RICO holding. The preemption holding generated the bulk of the analysis, due to the tension with Ford.

The Fenner court attempted to clarify the Sixth Circuit's position on preemption by distinguishing the claims brought in each case. Fenner resulted from the consolidation of a number of cases, so there were a number of states and a number of state laws at issue.

Some of the claims involved consumer protection laws, including unfair or deceptive trade practice laws.[11] Other claims were simple common law fraud claims, including breach of contract and fraudulent concealment.[12] GM argued that the CAA preempted all of these claims.[13]

GM invoked obstacle preemption, which is different from — and typically harder to prove than — either conflict or field preemption, and requires a showing that while complying with both federal and state law is feasible, doing so would undermine federal policy.[14]

In the automotive emissions context, GM argued, the CAA requires the EPA to set and enforce emissions standards. Vehicles generally need to be certified to conform with EPA standards to be sold in the U.S., and the EPA also approves auxiliary emission control devices.

An AECD is referred to as a "defeat device" when it reduces the effectiveness of the emissions system under reasonably expected conditions of normal vehicle operation and use without qualifying for an exception — e.g., protecting the engine.[15]

Given the overlap consumer claims have with the EPA's emissions certification regime, GM posited that consumer class action emissions claims present an obstacle to achieving Congress' purposes and objectives in regulating vehicle emissions in a consistent manner,

and avoiding a patchwork of state and local laws.

Obstacle Preemption: Distinguishing Ford

Obstacle preemption claims are more difficult to prove, because they arise in situations where Congress has not clearly expressed its intent. The Sixth Circuit has disfavored obstacle preemption, applying a "presumption against preemption." [16]

This presumption was a threshold difference with *Ford*. The *Ford* panel determined that those plaintiffs alleged a fraud-on-the-agency against the EPA, an area that states have not traditionally policed — and therefore, an area not subject to a presumption against preemption. [17]

In contrast, the *Fenner* panel viewed the gravamen of the plaintiffs' claims as fraud-on-the-consumer allegations, irrespective of any statements made to the EPA. Here, because states have traditionally policed such conduct, a presumption against preemption applies.

With that framework in mind, the Sixth Circuit evaluated each of the plaintiffs' five theories of liability against the four preemptive conflicts underlying the decision in *Ford*.

The plaintiffs' theories of liability were that Duramax diesel trucks emitted more than: (1) their gasoline counterparts; (2) what a reasonable consumer would expect; (3) what GM advertised; (4) the EPA's maximum standards; and (5) the levels at which the EPA will certify a vehicle to be sold in the U.S. [18]

The Sixth Circuit dismissed the fourth and fifth theories of liability under the first conflict identified in *Ford* — these theories impermissibly challenged the EPA's certification of Duramax trucks pursuant to the CAA. [19]

But the first three theories of liability all survived a preemption challenge. First, the court held these challenges would not rebalance the EPA's policy objectives, because the court could evaluate liability based on evidence that arose independent of the agency's certification procedures. [20]

Second, hearing these challenges would not usurp the EPA's authority to police fraud with respect to its testing procedures, because the comparison points would be claims made to the consumers, not the EPA. [21] Here, the court specifically rejected GM's arguments that the AECD process, in particular, was intertwined with all of the claims it was making about emissions — and thus with all of the plaintiffs' theories of liability. [22]

Third, the court rejected GM's argument that entertaining these theories of liability would lead to a flood of superfluous information being submitted to the EPA during the certification process. The court maintained that any information submitted to the agency could not serve as a defense to the first three theories of liability. [23]

The court thus dismissed two theories of liability, and let three proceed. However, the court was not unanimous in this regard.

As put forth in U.S. Circuit Judge Raymond Kethledge's dissent, all of the plaintiffs' theories are inherently based on the argument that these Duramax trucks contained a defeat device, which is prohibited by the EPA as part of its regulation of motor vehicles under the Clean Air Act. It is therefore necessary for a jury evaluating these consumer claims to revisit the EPA's regulatory determinations. [24]

Implied Preemption: Applying the Buckman Framework

Having distinguished Ford's application of obstacle preemption, the court analyzed the plaintiffs' remaining theories for implied preemption under *Buckman Co. v. Plaintiffs' Legal Committee*, a 2001 U.S. Supreme Court decision.[25]

In *Buckman*, the Supreme Court articulated two factors for evaluating fraud-on-the-agency claims: (1) whether the duty that the consumers allege was violated actually arises from a duty created by federal law or regulation, and (2) whether proving fraud on the agency would, standing alone, impose liability.[26]

Applying these tests to the three remaining theories of liability, the Sixth Circuit found no preemption, because it determined that state consumer protection laws may still have been violated, even in a world where the EPA and federal emissions regulations did not exist.[27]

In support of its finding that the CAA did not impliedly preempt the plaintiffs' claims, the court pointed to the act's citizen suit and savings provisions, noting that both "are direct evidence of Congress's intent not to preempt state-law causes of action." [28]

Interestingly, however, the court did not address the CAA's citizen suit provision as an alternative path for plaintiffs to pursue, nor did the court address whether the act's unique citizen suit and savings provisions further distinguish Ford, which evaluated the preemption issue under the Energy Policy and Conservation Act.

The Path Forward

On Sept. 18, GM petitioned for rehearing en banc. Given the composition of the panel versus the Sixth Circuit writ large, there is a decent chance that rehearing will be granted.

If the holding remains in place, the case would proceed to trial, and a jury would evaluate the merits of the consumer protection claims without the benefit of comparing the Duramax trucks' performance against established emissions certification procedures and standards established by the EPA's regulations.

This may be an impossible task as, per Judge Kethledge's dissent, "none of [the plaintiffs] identified any other benchmark [aside from compliance with federal regulations] by which they could possibly assess the cleanliness of their trucks' emissions." [29]

Beyond the present litigation, the Sixth Circuit's opinion may create more uncertainty in a somewhat unsettled area of the law: the question of when the CAA impliedly preempts claims related to compliance with EPA regulations.

Prior to *Fenner*, the law remained unsettled as to when claims of tampering by a vehicle manufacturer were preempted by the CAA. However, the jurisdiction's ruling that the act did not preempt certain tampering cases at least articulated a bright-line rule that conduct prior to the introduction of a vehicle into commerce is preempted, whereas conduct following a sale — even by the certifying entity — is not.

But *Fenner* does not provide a bright-line rule. Instead, it reasoned that statements related to fuel economy performance in Ford were essentially EPA-approved fuel economy metrics, whereas the emissions performance statement at issue in *Fenner* was entirely independent of compliance with EPA regulations.

This may be an artificial distinction of the court's own making. A manufacturer's evaluation of its own emissions performance may well be based on the test cycles it uses to assess readiness for EPA certification, even if those certified results were not specifically articulated on consumer-facing advertisements.

Fenner also creates a further potential complication, which neither opinion addressed. While the issues in Fenner center around nitrogen oxide emissions, a future case may implicate greenhouse gas or carbon dioxide emissions.

Such a case may strain the Fenner framework, as tailpipe CO₂ emissions and fuel economy performance are essentially two sides of the same coin. It follows from Ford and Fenner that claims related to allegedly inflated fuel economy performance would be preempted, whereas claims related to inflated CO₂ emissions would not — even though both may stem from the same emissions control strategies under EPA regulations.

Whether the Sixth Circuit or other courts clarify Fenner, certainty and uniformity are vital interests for the U.S. to remain a leader in auto manufacturing. Those policies ought to be given consideration — particularly at a time of intense global competition for billions of dollars in investments and millions of jobs.

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[1] Fenner v. GM LLC, No. 23-1648, 2024 U.S. App. LEXIS 21112, at *13 (6th Cir. Aug. 21, 2024).

[2] Id. at *9.

[3] See id.

[4] Kyle Chermocha, Owners Sue General Motors Over Emissions 'Defeat Device' In Duramax Diesels, The Drive (May 25, 2017), <https://www.thedrive.com/news/10671/owners-sue-general-motors-over-emissions-defeat-device-in-duramax-diesels>.

[5] Fenner, 2024 WL 3886692, at *10.

[6] Id. at *11.

[7] Id. at *12.

[8] Id.

[9] Id.

[10] Id.

[11] Id. at *13.

[12] Id.

[13] Id.

[14] Id. at *14-15.

[15] See 40 C.F.R. § 86.004-2.

[16] Id. at *15.

[17] Id. at *17

[18] Id. at *20-21.

[19] Id. at *21.

[20] Id. at *27-28.

[21] Id. at *28-31.

[22] Id.

[23] Id. at *31-32.

[24] Id. at *51-54 (Kethledge, J. dissenting).

[25] Id. at *32.

[26] Id. at *33.

[27] Id. at *34.

[28] Id. at *40.

[29] Id. at *47 (Kethledge, J. dissenting).