By Richard Lazarus

# What Was the Auto Industry Thinking?

I am not a trial lawyer. So perhaps the motor vehicle industry had good reason to choose Vermont as the place to bring its test case, *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, challenging the validity of state efforts to regulate greenhouse gas emissions from new motor vehicles. Call me crazy, but do you really want your test case in a state that has become synonymous in commercial advertising with environmental awareness — the home of the U.S. Senate's only socialist? A state whose *name* means green?

OK, so let's say you decide nonetheless that Vermont is the place for you. Might drawing U.S. District Court Judge William K. Sessions III as your trial judge possibly prompt a rethinking of the wisdom of your strategy? Sessions is a respected jurist, a former public defender and member of the U.S. Sentencing Commission. Appointed by President Clinton, Sessions is a graduate of Middlebury College and a trustee at Vermont Law School (two academic institutions that are no strangers to environmental causes), and still lives in Middlebury. What are the odds that the heart of an environmentalist does not beat within those judicial robes?

In mid-September, Judge Sessions released an opinion that amounts to a 240-page take-down of the auto industry. The core legal issue in the case concerned the validity of California's adoption in 2004 of a comprehensive set of GHG emissions standards applicable to new vehicles. The Clean Air Act generally preempts states from applying their own motor vehicle emission standards but instructs EPA to grant California a preemption waiver upon the state's demonstration that its standards are at least as protective of the environment as the federal standards and needed, inter alia, to meet "compelling and extraordinary conditions." The act, in turn, permits other states to piggyback on California's more stringent standards by adopting them as their own. In the case of GHG emission standards, Vermont is one of approximately a dozen states that have done just that.

Because EPA has not yet acted on California's waiver request, the gravamen of industry's preemption claim was that regardless of EPA's future ruling, California's emission standards are already preempted by the federal Energy Policy and Conservation Act. EPCA provides the Department of Transportation with authority to promulgate fuel economy standards and expressly preempts any state laws or regulations "related to fuel economy standards." According to the industry, EPCA therefore necessarily preempts California's GHG emissions standards because the only practical way to regulate such emissions is tantamount to a fuel economy standard.

*The good news for the plaintiffs was that the court agreed the case was ripe. Unfortunately, so was the bad news*

Judge Sessions disagreed, and not even that respectfully. The court first concluded that preemption doctrines do not apply, reasoning that any state action that could be expressly authorized by one federal statute (the CAA) could not be deemed pre-empted by another federal statute (EPCA). The court was persuaded that the factors considered by EPA in deciding whether to grant the waiver would adequately address the policy concerns underlying EPCA's preemption provision.

The district court nonetheless backed up its judgment by engaging in a preemption analysis, and concluded that EPCA's language fell short of that necessary to establish a "clear and manifest purpose" to preempt state emissions standards. Based on pages of factual findings, the court systematically rejected industry's claims that GHG standards were no more than a fuel economy standard or otherwise "related to" such a standard within the meaning of EPCA.

Most significant, however, was the court's rejection of industry's claim that "conflict preemption" applied because it was impossible for industry to comply with California's standards. Here again based on detailed factual findings rooted in its assessment of competing expert testimony, the court concluded that industry had failed to establish that it was neither technologically feasible nor economically practicable to comply with the state standards or would otherwise limit consumer choice and public safety. Ironically, the linchpin of the court's reasoning was its view that industry, "once put in gear, responds admirably to most technological challenges." The court was accordingly "unconvinced automakers cannot meet the challenges of Vermont and California's GHG regulations."

Even more ironically, the only part of the case that industry won seems to be the weakest part of the court's ruling. The defendants had argued that the case was not ripe because EPA has not yet acted on the waiver preemption and therefore neither California's nor Vermont's emissions standards are yet enforceable. Industry plaintiffs had insisted the case was nonetheless ripe. The good news for the plaintiffs was the court agreed. The bad news was they might have been better off if the court had not.

Curious strategy all around. But, then again, I am not a trial lawyer.

**Richard Lazarus** *is on the law faculty of Georgetown University. He can be reached at lazarusr@law.georgetown.edu.*