

Round 2 – The Stink Surrounding Emissions

by Devala A. Janardan, Associate Counsel

It has been over two years since the United States Supreme Court released its decision in *Massachusetts v EPA*, ruling that the U.S. Environmental Protection Agency (EPA) had the authority, under the Clean Air Act,[1] to regulate emissions of greenhouse gases (GHGs) since these emissions "fit well within the Clean Air Act's capacious definition of [an] air pollutant."[2] This decision, while hailed as a landmark by environmentalists,[3] was only the first round in an all-out brawl between both sides of the global warming debate. While the first round focused on the ability of the federal government to regulate GHGs, the ongoing, second, round focuses on the ability of California (and states that adopt California's emission regulations) to employ stricter GHG emission regulations. There have been significant developments, discussed below, including a new, committed federal direction by President Obama, and lawsuits filed in the Second and Ninth Circuits.

Round two started with an opening shot by the State of California.[4] In 2004, the California Air Resources Board (CARB) released regulations to reduce GHGs, with the first regulation coming into effect in 2009. The Clean Air Act expressly preempts state regulation of motor vehicle emissions, but Section 209 of the Act provides that "any state which has adopted standards ... for the control of emissions from new motor vehicles ... prior to March 30, 1966,"[5] may be granted a waiver by the Administrator of the EPA as long as the state regulations are "in the aggregate, at least as protective of public health and welfare as applicable Federal standards."[6] While previous requests for a preemption waiver had been granted, the EPA Administrator countered by refusing to grant a waiver in this case, stating, "[w]hile I recognize that global climate change is a serious challenge, I have concluded that Section 209(b) was intended to allow California to promulgate state standards applicable to emissions from new motor vehicles to address pollution problems that are local or regional ... [and not] global climate change problems."[7] California brought suit against the EPA in a case that ultimately ended up before the D.C. Circuit Court of Appeals.[8] However, the case is "on hold" following President Obama's memorandum to the Administrator of the EPA, ordering the EPA to reassess whether the "EPA's decision to deny a waiver on California's application is appropriate in light of the Clean Air Act."[9] By making this move, many believe that President Obama is preparing to reverse the previous denial by the EPA.[10]

While the progress concerning the California case has slowed, a few GHG-related cases now in front of the Second and Ninth Circuits are heating up quickly. These cases, *Central Valley Chrysler Jeep v. Goldstene*[11] and *Green Mountain Chrysler v. Crombie*,[12] are efforts by the auto industry[13] to prevent California (and any state that adopts California's standards) from regulating GHGs. The argument centers around the Energy Policy and Conservation Act[14] (EPCA), which addresses the overall national fuel economy of a manufacturer's sales fleet. The EPCA states that "[w]hen an average fuel economy standard prescribed under [the EPCA] is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter." The auto industry argues that there is a fundamental and direct relationship between carbon dioxide emissions (a greenhouse gas) and fuel economy. The National Highway Traffic Safety Administration (NHTSA) has itself stated that, "CO2 emissions are always and directly linked to fuel consumption because CO2 is the ultimate end product of burning gasoline."[15] In addition, automobile manufacturers are required to calculate vehicle fuel economy by measuring CO2 emissions and converting those results into a miles-per-gallon figure.[16] In short, the position taken by the industry is that, by adopting GHG regulations, California was performing the functional equivalent of adopting a fuel economy standard, an action preempted by EPCA.

This position has been rejected by the district courts, one of which has stated that:

> [t]he general language of the preemption clause and the absence of any indication of Congressional intent about its limits, combined with the specific requirement to take EPA-approved California emissions regulations into consideration, supports a conclusion that Congress did not clearly intend to preempt such regulations. ... Unless this Court is to ignore decades of EPA-issued and approved regulations that also can be said to "relate to" fuel economy, this regulation does not "relate to" fuel economy within the meaning intended by Congress.[17]

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17. C.J. Wigley, III, *Disclosiveness, willingness to communicate, and communication apprehension as predictors of jury selection in felony trials*, 43 Comm. Q. 342-51 (1995); C.J. Wigley, III, *Verbal aggressiveness and communicator style characteristics of summoned jurors as predictors of actual jury selection*, 66 Comm Monographs 266-75 (1999). ML

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In addition to finding no evidence of express preemption, that court refused to find field preemption, as the plaintiffs failed to show "that Congress exhibited a clear and manifest intent to render the regulation of carbon dioxide emissions from motor vehicles exclusively a federal domain."[18]

IMLA is participating as an amicus in both the *California v. EPA* case and *Central Valley Chrysler Jeep v. Goldstene*. Oral argument in front of the Second Circuit in *Goldstene* is set to begin around the time of the publication of this issue of the *Municipal Lawyer*. Whether either party will be able to deliver a knock-out punch in this round is yet to be seen, but, certainly, the parties are training for a possible bout in front of the big stage – the United States Supreme Court.

Notes

1. 42 U.S.C. §7521(a)(1) (West 2009).
2. 549 U.S. 497, 532 (2007).
3. Jennifer Parker, *Supreme Court Rejects Bush in Global Warming Debate*, ABCNews.com, Apr. 02, 2007, at http://abcnews.go.com/Politics/story?id=3000959&page=1&CMP=OTC-RSSFeeds0312.
4. The author agrees that Round Two started before Round One ended, so perhaps it should be called Round 1.75; for simplicity's sake, though, let's just call it Round Two.
5. 42 U.S.C. § 7543(b)(1) (West 2009).
6. *Id.*
7. Notice of Decision Denying a Waiver of Clear Air Act Preemption, 73 Fed. Reg. 12,156, 12,157 (Mar. 06, 2008).
8. *California et al. v. EPA, et al.* (No. 08-1178, filed May 05, 2008, D.C. Circuit).
9. Memorandum for the Administrator of the EPA, 74 Fed. Reg. 17, 4905 (Jan. 26, 2009).
10. *Obama Moves to Let States Cap Car Emissions*, MSNBC.com, Jan. 26, 2009, at http://www.msnbc.msn.com/id/28846202.
11. 529 F. Supp.2d 1151 (E.D. Calif. 2007).
12. 508 F. Supp.2d 295 (D. Vt. 2007).
13. This includes motor vehicle dealerships, manufacturers, and a manufacturers' industry association (the Alliance of Automobile Manufacturers).
14. 49 U.S.C. § 3902.
15. 71 Fed. Reg. 17,659.
16. Brief for Appellant at 22, *Central Valley Chrysler Jeep v. Goldstene*, 529 F.Supp.2d 1151 (E.D. Calif. 2007) (No. 08-17378).
17. Green Mountain Chrysler Plymouth Dodge Jeep, 508 F. Supp.2d at 354.
18. *Id.* ML

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lawsuit brought on behalf of foster children in the custody of the Georgia Department of Human Resources (DHR). The plaintiffs sued the state, the DHR, various counties, and each county's department of family and children services and its directors, alleging systemic deficiencies in the counties' foster care systems and asserting 15 causes of action under federal and state law. The complaint sought declaratory and injunctive relief, as well as attorneys' fees and expenses. The matter was resolved by way of a settlement agreement that stated "Plaintiff Class is entitled to recover its expenses of litigation, including reasonable attorneys' fees and nontaxable costs, pursuant to 42 U.S.C. § 1988 and Fed.R.Civ.P. 23(h)." If the parties could not reach an agreement, then the amount of any award was to be determined by the court, which is what happened. Counsel sought a total of $14,342,860 in fees, about half of which was an enhancement of the fee award for a job well done. Over the defendants' objections, the district court awarded a basic ("lodestar") fee of $6,012,802.90 and allowed the enhancement, noting that "plaintiffs' counsel brought a higher degree of skill, commitment, dedication, and professionalism to this litigation than the Court has seen displayed by the attorneys in any other case during its 27 years on the bench." The defendants appealed, and the plaintiffs, "convinced that the district court was not generous enough," cross-appealed, insisting that they "deserve[d] even more" than the $10,500,000 total fees awarded to them.

The Eleventh Circuit noted that a merits-exceeding result for the plaintiffs had to be the product of one, or some combination, of "superior lawyering by plaintiffs' counsel, bad lawyering by defendants' counsel, poor decision making by the court, or dumb luck," but that Supreme Court precedent held that superior lawyering by the plaintiffs' counsel was not a proper basis for an enhancement. Further, there was a "perverse irony" in the "seven figure, court ordered gratuity in this case," in that it reduced the amount of state funds available to care for foster children, the very group in issue and described as some of Georgia's "most vulnerable citizens." Nonetheless, it declined to interfere with the award, indicating that, under the prior panel precedent rule, it was not free to decide the enhancement issue.

The matter now comes before the Supreme Court, which will decide whether a reasonable attorney's fee award under a federal fee-shifting statute can ever be enhanced based solely on the quality of performance and results obtained, when these factors already are included in the lodestar calculation, and whether an enhancement to the lodestar based on the quality of representation and results was contrary to the Court's prior rulings, particularly after the lodestar has been reduced for excessive hours billed.

IMLA will continue to update our members on these cases through our bi-weekly e-mail newsletter and this magazine. ML