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Analysis: Challenges remain in car emissions case

By Candace Page
Free Press Staff Writer

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Vermont's greenhouse gas emissions trial has ended. A verdict lies weeks, perhaps months, away. In the interim, the state and its allies will have one last chance to defend their case -- a case considerably battered during 16 days of legal combat with the auto industry in U.S. District Court in Burlington.

In briefs due June 8, lawyers for the two sides will sum up their arguments for or against rules written in California and adopted by 12 other states, requiring a 30 percent cut in greenhouse gas emissions from cars by 2016.

Vermont faces several challenges. One is to defend the much-questioned credibility of its key expert witness. A second is to rebut the auto industry's central argument, that Vermont's rules illegally impinge on the federal prerogative to set fuel economy standards, because carmakers must reduce fuel consumption to have any hope of meeting the emissions limits.

At stake, Vermont says, is the ability of states to help slow global warming by limiting carbon emissions from cars and trucks.

Wrong, say the automobile lawyers, the rules won't reduce global warming. Instead, they say, the jobs of thousands of autoworkers and the ability of drivers to buy their favorite cars, SUVs and pick-up trucks are at risk.

It is far from clear how Sessions will rule. The complicated case could turn on any one of several legal or factual arguments.

During summations Tuesday, the judge challenged both sides with skeptical questions and showed interest in an issue not discussed at trial: Whether the U.S. Environmental Protection Agency, which must approve California's regulations, could alter them to give automakers more time to reduce emissions.

The question alone suggested the judge was considering testimony by engineers from General Motors and DaimlerChrysler who repeatedly said their firms do not have the technological or financial capacity to raise fleet average fuel economy to 40 miles per gallon by 2016, the level needed to meet the emissions limits.

When they met in court

Vermont and its allies -- the state of New York and a number of environmental groups -- appeared to struggle at times during the trial.

Auto industry lawyers have been working on the emissions case since early 2005, when their first challenge was filed in California.

Vermont Assistant Attorney General Scot Kline was not assigned to the case until January, when it first became clear the Vermont challenge would be heard before California. Team member David Bookbinder, a Sierra Club lawyer, said the coalition of Vermont, New York and national environmental groups was still sorting out trial assignments in March.

In fact, the State of Vermont did not play a starring role in the courtroom. While Kline delivered brief opening and closing statements, New York assistant attorneys general handled most of the key cross examinations as well as examination of the state's central defense witness, K.G. Duleep. Environmental group attorneys handled much of the testimony by global warming experts.

Vermont Attorney General Bill Sorrell said last week the state has spent only \$57,000 so far. More bills are expected and the state has set aside \$465,000 to pay expenses of the trial and any appeals, though not all the money may be needed, he said. A spokesman for the Alliance of Automobile Manufacturers declined to say what the auto industry is spending.

Differences between the two teams showed in surface ways that may have no effect on the trial's outcome, but were striking nonetheless.

The auto industry team, for example, included a computer graphics expert who flashed colorful, easy-to-understand charts and graphs on widescreen monitors, as witnesses testified, instantaneously reinforcing their points.

Lawyers from Vermont and New York relied most of the time on printed documents, sometimes interrupting the flow of questioning to rifle through files to find what they were looking for.

Other differences were more substantive.

Auto industry lawyers had what may be an advantage of witnesses from auto companies themselves, able to present detailed data to back up their assertions the rules are too challenging to meet.

The state's witnesses relied on less detailed industry-wide and average data about technology improvements and costs. Automobile witnesses challenged that data as unreliable or misleading.

Auto industry lawyers who cross-examined each of the state's witnesses had at their fingertips video clips from earlier depositions, ready to pounce if a witness on the stand gave an answer that differed from the answer given at the pre-trial deposition. They did so repeatedly.

Cross-examination by the defense team appeared to succeed much less frequently in raising doubts about the reliability of automakers' witnesses.

The dilemma of Mr. Duleep

But Vermont's biggest problem may turn out to be the testimony of its key witness on the ability of the auto industry to comply with the greenhouse gas limits.

Duleep, an independent automotive consultant, offered an analysis showing car companies already have enough new engine, transmission and other technology on the shelf to substantially improve fuel economy. Combined with adding more electric hybrids to their fleets, those improvements would allow manufacturers to cut emissions 30 percent by 2016, at an average cost of \$1,500 a car, Duleep testified.

Duleep's testimony appears critical because the case could hinge on whether car companies can meet the California/Vermont standard without suffering serious financial harm, laying off workers and restricting consumer choice.

Until Duleep took the stand, the only evidence on the cost of compliance came from auto industry engineers and industry witness Thomas Austin, an automotive engineering consultant. They all said compliance was impossible by 2016. Austin cited the results of his vehicle simulation model, which shows what happens to vehicle performance, second-by-second as a vehicle accelerates or decelerates, after fuel-saving technology has been added to the engine or transmission.

Even Honda and Toyota, the companies with the most fuel-efficient vehicles, would need 12 years, not nine, to comply with the regulations, he testified. And for some companies, the cost-per-car of emissions reductions would top \$5,000 per vehicle.

Automakers recalled Austin, and brought in a leading University of Michigan automotive engineering professor and textbook author, to testify that Duleep's input data was unreliable and his analytical methods were not just inferior to Austin's, but not at all credible.

"I don't think (his approach) is very reliable," the retired professor, Donald Patterson, testified. "He used a 'fudge factor' ... that is entirely arbitrary. ... You could not independently test his model."

"How much confidence do you have in the accuracy of Mr. Duleep's conclusions?" asked an auto lawyer.

"I have no confidence," Patterson said.

Under cross-examination, Patterson stuck to his critique, saying Austin's vehicle simulation model was a preferable analysis. Duleep's "multiplicative" method is not the best way, he said.

"Good enough for government work?" the judge joked in an aside at one point.

The state of Vermont flew in another University of Michigan automotive expert to defend Duleep's methods. After taking the professor's deposition outside the courtroom, the defense team decided not to call him to the stand.

The automakers already have filed a motion to have much or all of Duleep's testimony excluded, while the state hopes to bolster his credibility by entering documents into evidence that show how other experts have used similar analytical methods. The judge has yet to rule on that question.

What's next?

While the state may have struggled at times, the burden of proof lies with the makers. They must persuade Sessions the evidence shows Vermont imposed fuel economy standards and those standards are either expressly or by implication forbidden by federal law.

Sessions has given no indication whether or not he has been persuaded. He has thousands of pages of evidence to examine, evidence that can lend depth and credibility to trial testimony offered by both sides.

The judge said in April he expects to rule "relatively quickly" after the case is completed -- and expects his decision to be appealed, whichever way it goes.

Last week, both sides expressed optimism about the outcome.

"I feel like we got the opportunity to present all the facts and I trust the judge to make the right decision," said Andrew Clubok, lead attorney for the auto industry. "I know it is not easy to ask any judge to strike down a regulation passed by their state. But this was an extraordinary case and I think we were able to put in why this regulation is so illegal and dangerous."

Defense attorney Bookbinder of the Sierra Club saw it differently.

"How many states have adopted this rule now? I just don't think the judge is going to strike down a regulation adopted by 13 states in order to save General Motors," he said.

Contact Candace Page at 660-1865 or e-mail cpage@bfp.burlingtonfreepress.com

CAR CASE: WHAT'S NEXT? THE CASE: Green Mountain Chrysler Plymouth Dodge Jeep et al. v. George Crombie, Vermont secretary of natural resources WHERE: U.S. District Court, Burlington, Judge William Sessions presiding SUBJECT: Challenge to Vermont's adoption of California limits on greenhouse gas emissions PLAINTIFFS: Two Vermont auto dealers, General Motors Corp., DaimlerChrysler Corp., the Alliance of Automobile Manufacturers and the Association of International Automobile Manufacturers DEFENDANTS: Three officials from the Vermont Agency of Natural Resources. Intervenors on behalf of Vermont: state of New York, Conservation Law Foundation, Environmental Defense, Natural Resources Defense Council, Sierra Club, VPIRG COMING NEXT: Before June 8, the two sides will file post-trial briefs. Automakers will continue efforts to have the judge exclude testimony given by the state's expert on the cost of complying with the rules, on grounds he did not use acceptable scientific methods.