

DOT In Driver's Seat In Battle Over Rearview Camera Rule

By **Greg Ryan**

Law360, New York (September 26, 2013, 8:50 PM ET) -- The quest to force the U.S. Department of Transportation to require rearview cameras or similar technology in new cars is complicated by the latitude Congress gave the agency over the timing of the rule's release, putting consumer groups pushing for immediate implementation of the pricey mandate at a disadvantage, attorneys say.

In a petition on Wednesday, Consumers Union, two car safety groups and two parents who accidentally struck their children with cars urged the Second Circuit to force the DOT to finalize a proposed rear visibility rule. In a 2008 law, Congress directed the DOT to issue the rule by February 2011, but the agency has pushed back the deadline several times, with the rule now supposedly due by January 2015.

"Because they were expressly given some discretion in terms of timing, that's going to weigh heavily in favor of the DOT," Bowman and Brooke LLP managing partner William Auther said.

At first glance, attorneys said, the petitioners appear to have the upper hand in the dispute: The rule is two and a half years late; the DOT has already proposed the rule and drawn up a final version; and the lack of a rule, by the agency's own admission, jeopardizes children's lives. Courts tend to rule against agencies in lawsuits over rule delays if the agency has failed to meet a statutory deadline, they said.

The DOT may hold a trump card in this case, however: Congress allowed the agency to move back deadlines related to the rule if they "cannot be met." The provision doesn't give the government free rein to postpone the rule indefinitely, but it does make the consumer groups' task significantly more difficult, according to attorneys.

The consumer groups acknowledge in the petition that the DOT can postpone the deadline. They focus on what they deemed an inadequate explanation for the most recent delay. In letters to House and Senate leaders in June, then-Transportation Secretary Ray LaHood justified the 2015 deadline by saying the agency needed more time to study crash data, "to further refine its understanding of how the proposed requirements address the real-world safety risk."

The groups called the rationale "bare" and "unsupported by any specific facts or considerations 'requir[ing]' delay." The DOT failed to explain why the crash data was essential to the finalization of the rule, they said.

The problem with that line of attack, attorneys said, is that the law calling for the rear visibility rule, the Cameron Gulbransen Kids Transportation Safety Act, does not explicitly require the DOT's reasons for a delay to meet any standard. It says only that, if the DOT determines a deadline cannot be met, it can establish a new deadline and notify lawmakers of the change, "describing the reasons the deadlines specified under this act could not be met." LaHood sent letters to lawmakers and they included a rationale for the delay, much as the consumer groups may not have liked it.

"The department's going to say, 'We gave you the letter. We wanted to do more analysis. We wanted to make sure we're taking into account all of the flexibility that the statute provides for.' They're going to say they fulfilled that requirement," said Jacqueline Glassman, a partner at Hogan Lovells and the former chief counsel and acting administrator of the National Highway Traffic Safety Administration.

The agency is helped by all it has accomplished in the five years since the Gulbransen law was passed, including the proposal of the rule in December 2010, the submission of a final rule to the White House, and the continued research into the potential effects of the rule, attorneys said.

Although the consumer groups point to the DOT's progress in developing the rule as proof it's ready for release now, the court may see the same progress as evidence the agency is making a good faith effort to get out the regulation as soon as possible and give it the benefit of the doubt, according to attorneys.

"The advocates have a very high standard they would have to meet, to say that when the agency has done all of this work and taken all of these steps ... how that rises to the level of agency inaction," Glassman said.

While the consumer groups may face an uphill struggle, it's not a foolhardy one, attorneys stressed. The case is likely to swing on the so-called TRAC analysis, named after the D.C. Circuit's 1984 ruling in Telecommunications Research and Action Center v. FCC, which sets out a series of factors that courts can balance to determine whether an agency's delay in issuing a rule is unreasonable.

"The court will decide whether the explanation that's been given [by the DOT] meets the standard in the statute," said Thomas Regan, the leader of LeClairRyan's automotive industry team. "The standard in the statute is if the deadline 'cannot be met.' Maybe the court will decide those are legitimate reasons it can't be met, maybe it won't."

--Editing by Jeremy Barker and Katherine Rautenberg.

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