

Why Was the Lawsuit Challenging California's Cap-and-Trade Auction Filed Just One Day Before the Auction? | 1

As [Ann posted earlier today](#), the California Chamber of Commerce [has filed a petition for writ of mandate](#) in a California superior court, alleging that the auction of allowances to emit carbon dioxide scheduled for tomorrow constitutes an illegal tax and is not authorized by the California law AB 32. AB 32 requires the state to reduce greenhouse gas emissions, and the Legislature has tasked the California Air Resources Board with making that happen. The ARB has developed a cap-and-trade program for carbon dioxide – among other measures – to reduce greenhouse gas emissions in the state. As part of that program, ARB will be auctioning allowances to emit carbon dioxide.

The strangest thing about this lawsuit, to me, is its timing. This is truly an eleventh-hour lawsuit. Moreover, I haven't seen any evidence that the plaintiffs are even asking that the court issue an order to block the auction before it happens tomorrow. While the plaintiffs are formally seeking a court order invalidating the auction, the auction will go forward if such an order isn't issued by tomorrow morning.

Clearly, if someone wants a court to order a government agency to refrain from taking an action, the best way to make that happen is to ask the court for that order ahead of time. And under the California law that empowers residents and businesses to challenge government agency action (a challenge known as a request for a writ of mandamus), it's not difficult to get a court to rule ahead of time. Consequently, a party seeking to ask a court to block long-planned governmental action will usually take care to file its lawsuit in plenty of time for a court to act. If a party is jammed for time, it may request a temporary restraining order, or may request immediate relief from the court through an expedited request for a hearing to ask the court to block the government from following through with its planned action. California procedure allows such requests on short notice.

The facts underlying this case have been known for some time: the Air Resources Board developed its cap and trade program long ago, and approved it in December 2011. The regulations the lawsuit seeks to overturn were adopted at that time. Yet the Chamber of Commerce filed the lawsuit the day before the first auction, eleven months after the approval of the regulations that authorized the auction.

While it's possible that the Chamber has filed a request for expedited emergency review, I have not seen such a request in the public court papers or in the media release put out by the Chamber. And because the case could have been filed on a less urgent basis, it's unlikely that a court would grant such a request anyway.

At the same time, once the auction has taken place, it will be very difficult to undo, as a practical matter, since auction participants will have taken significant steps in reliance on

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the auction. Indeed, courts typically will be much less likely to grant relief in such a situation.

So why would the Chamber file this case the day before the auction?

The lawsuit, which has gotten ample publicity, certainly has the potential to create uncertainty in the auction market. Such uncertainty may depress the price of allowances, which could create a windfall for speculators if they can buy the allowances cheaply and the price rises later on. Alternatively, the uncertainty could affect the market itself by scaring away potential participants, which would make the auction less likely to reflect a robust market for allowances.

If creating the appearance of uncertainty is a goal of the plaintiffs in this case, it will be unsurprising if they do not ask for immediate relief. By filing the lawsuit the day before the auction, they can create the appearance of uncertainty, and by ensuring that a court does not yet have an opportunity to make a ruling, they can ensure that the uncertainty will still be there when the auction takes place. This would be, to say the least, an unfortunate use of our legal system.

If the plaintiffs have sought an immediate remedy, that would provide some evidence that they are serious about their legal claims, at least, and it could give ARB a chance to rebut the lawsuit's contentions (though, at this point, it's hard to imagine there will really be time for that). But one way or the other, the late filing here does not make me optimistic that the case will be resolved soon. While I have seen people of good will express diverse views on the process that ARB has developed, it would be unfortunate if the mere filing of an eleventh-hour lawsuit were to have an impact on the auction.