



The Volkswagen AG (VW) logo sits on a sign outside the automaker's headquarters on April 13, 2018. Photographer: Krisztian Bocsi/Bloomberg via Getty Images

Class Action News

INSIGHT: MDL Litigation—Setting Ground Rules for Recovering Attorneys' Fees

By Andrew Finn and Natalie Muscatello

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The Ninth Circuit's ruling in the Volkswagen emissions multidistrict litigation stands as one of a small number of federal circuit court opinions addressing fee requests from non-class counsel in an MDL. Sullivan & Cromwell attorneys say counsel in large MDL should consider seeking a pretrial order to govern attorneys' fees that may be compensable at later stages, including in the event of a class-wide settlement.

As of August, the Judicial Panel on Multidistrict Litigation reported [nearly 200 pending multidistrict litigations](#) (MDLs) in district courts across the country, with more than [140,000 lawsuits](#), and by the end of 2018, MDL courts were overseeing [more than half of all pending federal civil cases nationwide](#).

Despite these numbers, there are no special procedural rules for managing many of the unique complexities of MDLs, and district judges are often left to fashion their own procedural rules of the road on a case-by-case basis.

A recent decision by the U.S. Court of Appeals for the Ninth Circuit in the Volkswagen emissions MDL sets an important precedent allowing district courts to set the ground rules for whose work on the plaintiffs' side may later be compensable and in what circumstances.

This issue may not be at the top of mind for counsel at the outset of an MDL involving class action claims, but it should be.

The Volkswagen Emissions MDL

Since late 2015, more than 1,600 lawsuits, including class actions, arising from Volkswagen's diesel emissions issues have been centralized in an MDL in the Northern District of California before the Honorable Charles R. Breyer. In January 2016, the court appointed a plaintiffs' steering committee and interim lead plaintiffs' counsel, and soon thereafter, the committee and lead plaintiffs' counsel filed a consolidated amended complaint on behalf of a putative class of consumers.

The court, however, did not stop there. In a separate pretrial order, Judge Breyer set forth a detailed protocol for authorizing and tracking so-called "common benefit work and expenses" on behalf of the putative consumer class. The order provided that lead counsel and the plaintiffs' steering committee would be authorized to do "common benefit work," and could designate additional counsel to do common benefit work as well.

Non-class counsel who were not appointed to the steering committee also could seek approval from appointed lead counsel to do "common benefit" work. The order also expressly listed the categories of work that could qualify as "common benefit," and required appointed lead counsel to collect and maintain records in support of any common benefit work.

The order thus empowered appointed lead plaintiffs' counsel to serve as an initial gatekeeper for authorizing and approving work done on behalf of the consumer class, while allowing non-class counsel to contribute to that work—so long as it was done in a coordinated fashion with the blessing of lead counsel.

Volkswagen Non-Class Counsel Fee Motions

In 2016, Volkswagen entered into [an initial consumer nationwide class action settlement](#). The settlement addressed hundreds of thousands of vehicles sold or leased in the United States, and the vast majority of eligible class members accepted the settlement.

As part of the settlement, Volkswagen agreed "to pay reasonable attorneys' fees and costs for work performed by Class Counsel in connection with the Action as well as the work performed by other attorneys designated by Class Counsel to perform work in connection with the Action" in an amount approved by the court.

“Class Counsel” was defined as the plaintiffs’ steering committee and appointed lead counsel. As provided in the settlement, the court awarded fees and costs to lead counsel and the steering committee.

But the story of attorneys’ fees did not stop there. Following approval of the settlement by the district court, hundreds of lawyers for individual settling class members who did not perform work authorized by lead counsel or the plaintiffs’ steering committee filed their own motions seeking payment of their attorneys’ fees and costs, either from the amount that Volkswagen had already paid to the plaintiffs’ steering committee or from Volkswagen, on top of the fees already awarded by the district court.

These motions generally sought fees for time spent drafting individual complaints, communicating with clients, monitoring the MDL proceedings and advising clients on the class settlement.

In April 2017, Judge Breyer denied all of those motions, ruling that Volkswagen had not agreed to pay the attorneys’ fees of non-class counsel and that such fees and costs were neither authorized by law nor provided for in the settlement agreement. Notably, the court relied in part on the fact that non-class counsel had not coordinated with lead counsel or the steering committee in doing any of their work, and that their work did not benefit the class as a whole.

The court ruled therefore that non-class counsel had failed to follow the procedures set forth in the court’s pretrial order governing “common benefit” work.

The Ninth Circuit Decision

Non-class counsel appealed, and on Jan. 22, the Ninth Circuit affirmed Judge Breyer’s order in all respects in [*In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prod. Liab. Litig.*](#)

Although recognizing that individual non-class counsel may have worked “diligently and presumably competently for their clients,” the Ninth Circuit ruled that “because there is no indication that any of these efforts actually benefited the class and complied with the [district court’s pretrial orders], the district court did not abuse its discretion, by either applying the wrong law or relying on erroneous factual determinations, when it denied Appellants’ motions for attorneys’ fees.”

The Ninth Circuit thereby confirmed the district court’s authority to issue the pretrial order governing “common benefit” work, and that non-class counsel’s failure to adhere to that order by obtaining authorization from class counsel precluded an award of attorneys’ fees. On Oct. 7, the U.S. Supreme Court denied non-class counsel’s petition for a writ of certiorari.

The Ninth Circuit’s ruling now stands as one of a small number of federal circuit court opinions addressing fee requests from non-class counsel in an MDL, and the first of which the authors are aware to recognize a MDL court’s power to set the ground rules for fee-shifting in a class action through a pretrial order.

Implications

Counsel who find themselves in a large MDL should consider seeking a pretrial order early in the proceedings to govern attorneys' fees that may be compensable at later stages, including in the event of a class-wide settlement.

The parties may wish to propose (i) the specific types of work that will or will not qualify as "common benefit" work on behalf of a putative class, (ii) that any "common benefit" work must be authorized by the plaintiffs' steering committee or lead counsel before it is performed; and (iii) the records that must be maintained showing the details of that work should any fee application be made at later stages.

While such an order may not be appropriate in every case, setting out the ground rules for what may be compensable work on the plaintiffs' side at the outset of an MDL can provide for greater certainty with respect to attorneys' fee exposure (if any) later on.

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