

Blog Entry: Question – When Is a \$3 Million Attorney Fee Award Painful?

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Author: Jeremy Gilman (former Partner at Benesch Law)

Answer: When your fee request was \$25 million higher.

And so it was in *In Re: Volkswagen “Clean Diesel” Marketing, Sales Practices, and Products Liability Litigation*, pending in federal court in San Francisco. The case arose, in the court’s words, from VW’s “deliberate use of a defeat device - software designed to cheat emissions tests and deceive federal and state regulators - in nearly 600,000 Volkswagens- and Audi-branded turbocharged direct injection diesel engine vehicles sold in the United States.”

Here’s how the software worked, per the court: the “defeat device” would sense when the vehicles were being tested and would then produce regulation-compliant results. But when the vehicles were driven under normal circumstances, they’d use a less effective emissions control system. “Only by installing the defeat device on its vehicles was Volkswagen able to obtain” the requisite governmental approvals “for its 2.0- and 3.0-liter diesel engine vehicles,” even though those vehicles actually emitted “nitrogen oxides at a factor of up to 40 times over the permitted limit.”

Franchise dealers of VW-branded vehicles sued VW, claiming they were damaged by this “emissions scandal.” Class certification was sought, and a settlement was reached, encompassing a nationwide class consisting of “all authorized Volkswagen dealers in the United States who, on September 18, 2015, operated a Volkswagen branded dealership pursuant to a valid Volkswagen Dealer Agreement.” Under the settlement, VW was required to pay \$1.19 billion in cash and provide various non-cash benefits to the class.

All told, a good deal for the class. As the court noted, the settlement “had multiple cash and non-cash components, and ... ultimately will provide franchise dealer class members with a recovery of nearly all of their losses attributable to Volkswagen’s disclosure of its use of a defeat device.”

High fives in plaintiffs’ camp! Crack open the Veuve Clicquot!

Class counsel then moved for attorneys’ fees, stating in their motion that their “intense negotiations with Volkswagen led to the second largest class action settlement in automotive case history ... and likely one of the top 20 largest class settlements in history in any arena. In fact, the over \$2.1 million average payment to Franchise Dealer Class Members may be the highest average payment to members of a class in any class action settlement.”

They asked the court to award them “

\$28.56 million in attorneys' fees, inclusive of costs." And they described their request - which represented, they said, "a fee of 2.0% of the constructive settlement fund of \$1.39 billion" - as a "historically miniscule fee" which was "unquestionably fair, reasonable and appropriate compensation in relation to the exceptional results achieved for the" class. "This remarkably small request," they declared, "is likely the second-smallest fee amount ever requested in a large common fund case."

So why did the district court cut their requested fee by nearly ninety percent?

Because it found that under "the unique circumstances leading to the Settlement," the "lodestar method, as opposed to the percentage method, is the appropriate method for determining fees," and the lodestar amount was far lower than the amount they'd requested in their fee application.

Under the "lodestar method," fees are calculated by multiplying the number of hours reasonably expended by reasonable hourly rates. Computing fees by this method tends to yield lower fee awards than does the percentage method, especially in cases like this one where the settlement fund is large.

The court found that using the percentage method in this case "would overcompensate" class counsel "for its work." Class counsel, it reasoned, "did not expend significant additional time procuring the Settlement, nor did it undertake significant additional risk, given Volkswagen's incentive to settle quickly."

What does that mean, "significant *additional* time" and "significant *additional* risk?" And why did VW have an "incentive to settle quickly?"

Well, as it happens, before settling the franchise dealer case, VW had settled *another* emissions-related case; that one between VW, on one hand, and consumers, dealers, securities plaintiffs and government agencies, on the other. That case settled for \$10.033 billion, and class counsel in that one were awarded \$167 million in fees.

That case, in other words, was the main event. Given that the franchise dealer settlement followed on the heels of that larger settlement, the court reasoned that the former "flowed naturally and necessarily" from the latter. It calculated class counsels' lodestar sum in the franchise dealer case as being "only \$1.48 million," meaning that their requested \$28.56 million fee "would be a 19x lodestar multiple." That didn't fly. But a 2x multiplier did, given the risks class counsel assumed in the litigation, and so class counsel were awarded \$2,954,455 in fees for work performed relating to that settlement, plus \$87,538 in costs.

And so class counsels' fee request was mightily reduced by the court. But they could still take solace in the praise their efforts elicited from the court. Class counsel "achieved a great result for the franchise dealer class members, even in the face of uncertain risk and litigation length." "The result" they "achieved is excellent." Words like those endure long after the fees have evaporated.

Wouldn't you say?

The case is *In Re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, United States District Court, Northern District of California, MDL No. 2672 CRB (JSC), and the decision was rendered on April 12, 2017