

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Charles R. Breyer, Judge

IN RE: VOLKSWAGEN "CLEAN)
DIESEL" MARKETING, SALES) NO. MD 15-02672 CRB
PRACTICES, AND PRODUCTS)
LIABILITY LITIGATION,)
_____)

San Francisco, California
Tuesday, August 1, 2017

TRANSCRIPT OF PROCEEDINGS

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Reported By: Lydia Zinn, CSR No. 9223, FCRR, Official Reporter

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Multiple other counsel also present, both in person and via
telephone through CourtConnect, as reflected in the minutes

1 Tuesday - August 1, 2017

9:02 a.m.

2 P R O C E E D I N G S

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4 **THE CLERK:** You may be seated. Calling Civil Action
5 C. 15-MD-2672, In Re: Volkswagen Clean Diesel Marketing, Sales
6 Practices, and Products Liability Litigation. Counsel, please
7 state your appearances for the record.

8 **MS. MORRISSEAU:** Elizabeth Morrisseau, for the State
9 of Wyoming. And with me at counsel table is Water and Natural
10 Resources Division, James Kaste. And Wyoming Attorney General
11 Pete Michael should be sneaking in momentarily.

12 **THE COURT:** Sneaking in? He doesn't have to sneak
13 in.

14 **MS. MORRISSEAU:** He don't do a good job of sneaking
15 he's six-foot-six.

16 **THE COURT:** I would expect that in Wyoming, exactly.
17 Is he coming, you said?

18 **MS. MORRISSEAU:** He is coming.

19 **THE COURT:** Would you like us to wait a few minutes?
20 When do you expect him?

21 **MS. MORRISSEAU:** Well, he's -- they're concluding a
22 business meeting at the Conference of Western Attorney
23 Generals. He should be here shortly.

24 **THE COURT:** Where is that?

25 **MS. MORRISSEAU:** It's, I think, a five-minute cab

1 ride away from here.

2 **THE COURT:** There's no such thing as a five-minute
3 cab ride in San Francisco. There used to be, but that's out of
4 the past.

5 Okay. Well, I'll tell you what. Let's wait. Let's wait.
6 Let's wait 10 minutes. All right? We'll resume at 9:15.
7 You're not in a hurry.

8 Is your family out here, Mr. Giuffra?

9 **MR. GIUFFRA:** Your Honor, I really love
10 San Francisco. And the thing that's so striking about it is I
11 got off the plane, and it's cool in San Francisco. It's really
12 hot in New York. And whenever I come here in the winter time
13 and it's cold in New York, it's nice in San Francisco. It's
14 just --

15 **THE COURT:** Don't tell anybody that.

16 **MR. GIUFFRA:** It's just incredible.

17 **THE COURT:** You've told too many people that already.
18 That's why we're having no such thing as a five-minute cab
19 ride.

20 We'll wait. If he comes in before 9:15, please let my
21 clerk know.

22 **MS. MORRISSEAU:** Thank you, Your Honor.

23 (Recess taken from 9:04 a.m. until 9:11 a.m.)

24 **THE CLERK:** You may be seated. Recalling Civil
25 Action C. 15-MD-2672, In Re: Volkswagen. Counsel, please

1 state your appearances.

2 **MS. MORRISSEAU:** Elizabeth Morrisseau, for the State
3 of Wyoming. And with me is Attorney General Pete Michael, and
4 also Water and Natural Resources Division Deputy, James Kaste.

5 **THE COURT:** Good morning. Welcome.

6 **MR. GIUFFRA:** Good morning, Your Honor.

7 Robert Giuffra, from Sullivan Cromwell, for the Volkswagen
8 defendants. And along with me is my colleague, Bill Wagener.

9 And I noticed the new artwork. It looks quite nice.

10 **THE COURT:** Yes, yes. You know, these are copies of
11 murals that are in Coit Tower in San Francisco, which were the
12 WPA murals.

13 And we had, in the '30s, of course, a lot of murals. A
14 lot of artwork was created under the -- under WPA given to the
15 government. It was actually paid for by the government. And
16 over the years, regrettably, some of them have deteriorated
17 over time; but we have been quite active -- at least this
18 Court -- in restoring murals. And we have a courthouse up in
19 McKinleyville that has these.

20 Now, they were controversial in the '30s. I guess they
21 probably still are controversial, because the themes of the
22 '30s were, you know, during the Depression were rather
23 pronounced; but art is worth preserving, and it is in the
24 public domain, and it ought to be celebrated in courthouses.

25 People come to courthouses not because they want to be

1 here, but because they are required by our process to be here.
2 And if you notice in the corridors, we have a lot of
3 photographs up which are of an historic nature, to try to give
4 people who come to the courtroom some feel that there is a
5 history in courts and the community. And it's important. It
6 does serve that function. And so thank you for pointing it
7 out.

8 I have shown this to my colleagues. And it's up to them
9 to pick. I don't know. My theory was that they'll think that
10 -- it's sort of the problem with federal judges -- a problem --
11 one of the problems with federal judges, is that if one judge
12 has something, the others want to know why they don't have it,
13 as well. So my guess is maybe we will see more art in the
14 various courtrooms.

15 **MR. GIUFFRA:** Your Honor, just one procedural
16 question. Is CourtCall on? I just wanted to check. Is it on?

17 **THE COURT:** Oh, okay. Is it on?

18 **THE CLERK:** Yes.

19 **THE COURT:** Well, that's good. That will -- that
20 should inform my judgment as to how much I talk. Anyway.

21 Yes, sir.

22 **MR. GOLDBERG:** And Matthew Goldberg, on behalf of
23 Porsche AG.

24 **THE COURT:** Good. Welcome.

25 **MR. GOLDBERG:** Thanks.

1 **THE COURT:** Let's get to the substance of what we're
2 talking about today, which is a motion to dismiss the State of
3 Wyoming's complaint in the MDL matter. And I think I should
4 turn to Volkswagen first, and see if they want to add comments
5 to what's already been filed. Go ahead, Mr. Giuffra.

6 **MR. GIUFFRA:** Thank you very much, Your Honor.

7 This case is unprecedented. It's an unprecedented
8 enforcement action by what's called a non-177 state. And I
9 think Your Honor is aware of the distinction between California
10 and the 177 states which follow California. And under the
11 Clean Air Act, Section 177, Congress authorized California,
12 which was a leader in environmental matters before even the EPA
13 really got up and running to regulate emissions, subject to
14 oversight by the federal government.

15 And Wyoming is not a 177 state. And in the more than 50
16 years since the Clean Air Act, there has never been a court
17 decision upholding the right of a non-177 state to bring an
18 environmental enforcement action, which is what this is.

19 We've settled with Wyoming with respect to -- and a number
20 of other states; probably more than 40 -- their consumer
21 claims. We've settled with the bulk of the 177 states. And
22 the question before the Court is whether Wyoming, a non-177
23 state, can bring an environmental enforcement action.

24 And if one looks back at the history of the Clean Air Act,
25 and also enforcement actions involving automobile

1 manufacturers, there has never been a situation where a Court
2 has ever upheld an enforcement action brought by a non-177
3 state in the context of a defeat device.

4 And, as we point out in Appendix A to our Reply Brief,
5 there have been many situations, going back to Ford in 1972,
6 and to the present; and probably the biggest one before
7 Volkswagen being the big diesel truck case in the late '80s
8 [sic] -- actually, late '90s. Excuse me.

9 Now there's a reason for that, and it's pretty clear.
10 Section 209(a) of the Clean Air Act has an express preemption
11 provision, and the language could not be clearer, and we rest
12 on it. It says that a state cannot, quote, *Adopt or attempt --*
13 *adopt or attempt -- to enforce any standard relating to*
14 *emissions from new vehicles or new motor vehicle engines.* And
15 Congress put this provision in, because it was concerned about
16 having a patchwork of enforcement actions brought by states.

17 We also think, Your Honor, that these claims are impliedly
18 preempted, both because of conflict preemption, and also
19 because the field here is occupied by the federal government,
20 and to a lesser degree by California and states following
21 California.

22 Now let me say a word about the Wyoming statute, because I
23 think that's important in just illustrating what's going on
24 here. There are two regulations that Wyoming claims are being
25 violated. And one is a broad -- and we would describe it as a

1 vague -- regulation that prohibits a device or contrivance that
2 would, quote, *dilute or conceal emissions broadly*. And that's
3 a provision that would apply to a smokestack as well as a car.

4 Wyoming does not follow the definition of "defeat device"
5 that's in the federal regulations. It doesn't follow the --

6 California does, and there's a reason for that: Because
7 not all -- what are called "Auxiliary Emissions Control
8 Devices", AECDs -- it sounds like a band -- actually are
9 impermissible, because some control devices which actually do
10 have a dilutive effect on emissions systems are permissible to
11 protect the engine life. We're not saying that's the issue in
12 the Volkswagen defeat device, but what I'm saying is that the
13 regulation, itself, is one that could apply broadly to
14 smokestacks and everything else.

15 In addition, they have a provision that deals with
16 altering and rendering inefficient or inoperable a pollution
17 control device in a vehicle. And that makes sense, because
18 historically the way that the division of authority has been
19 set up under the Clean Air Act, both in terms of its language
20 in 209(a) and in 209(d), is that the states are entitled to
21 regulate cars once they are in use, once they have been
22 registered or are operating in the states, and preventing
23 people from actually going to an auto shop, and having the
24 emissions controls system be disrupted.

25 But there is no precedent of a non-177 state being

1 involved in a matter relating to a design feature in a vehicle,
2 which is what this case is about.

3 And one other point, just to set the stage: In the
4 Complaint they talk about roughly 300 -- based on what we
5 understand, there's roughly 370 cars that were registered in
6 Wyoming -- Volkswagen cars, but in the Complaint they talk
7 about several thousand.

8 But just to give Your Honor a sense of the penalties we're
9 talking about -- and these are penalties, just by their terms,
10 that make sense only in the context of smokestacks and other
11 types of what are called "stationary pollution source devices."

12 And the way -- the way that -- another aspect of the Clean
13 Air Act is that mobile source devices, which is in Article II
14 [sic] of the Clean Air -- Title II of the Clean Air Act, are
15 regulated by the federal government; but stationary sources of
16 pollution, like a plant, are governed by the -- regulated by
17 the states.

18 But the penalties here that they're talking about are
19 \$347,500 per day. So if you have one car in Wyoming for a
20 year, the amount of fine that they could seek for that car
21 against the manufacturer of the car would be close to
22 \$1.4 billion. If you had a car that went to Yellowstone
23 National Park for five days, and it maybe was from California,
24 they could, you know, come to Volkswagen and say, *We want*
25 *\$150,000, because it was in the state for roughly -- roughly*

1 *five days*. And that just gives you a sense.

2 Now, the question, again, going to the text of the
3 preëmption provision, which is 209(a), is: Is this a standard
4 relating to the control of emissions from a new vehicle? The
5 enforcement action that they're looking to bring, pursuant to
6 the two regulations that I referenced. And clearly it is.

7 The Supreme Court, in the *South Coast* case, has talked
8 about a standard being a design feature, an emissions control
9 technology, and clearly, whether Volkswagen had defeat devices
10 in its vehicles. And the Complaint by Wyoming concedes and
11 acknowledges that those -- those defeat devices were put into
12 the vehicles in Germany, pursuant -- in engineering in Germany.
13 It wasn't something that was done in the United States.

14 So clearly it's a standard. And standard picks up things
15 like a design feature. And then the statute talks about
16 "relating to"; "relating to" -- the Supreme Court, in cases
17 like *Morales*, has talked about that being construed broadly.

18 So if the language of the statute is that the state cannot
19 adopt or attempt to enforce any standard, and the standard
20 picks up an emissions-control technology, and relating to --
21 relating to emissions, it's a pretty open-and-shut case, we
22 think, in terms of just the clear language of the -- of the
23 statute.

24 And in fact, Your Honor, the one case that's definitely on
25 point on all fours is a case from the First Department in

1 New York called *The Office of Attorney General*, where, after
2 that diesel situation involving all of the diesel truck
3 manufacturers, the New York State Attorney General sought to do
4 something very similar to what Wyoming is seeking to do here,
5 which is to basically seek an additional penalty on top of the
6 penalty that was already meted out by the federal government.
7 And the Court there -- and that was a case involving far more
8 vehicles even than Volkswagen. And the Court would not allow
9 the State Attorney General -- they quashed the subpoena from
10 attempting to enforce a standard relating to emissions, even
11 though New York was only seeking to a penalty under the
12 New York standards.

13 So we think, Your Honor, that cases such as the *Office of*
14 *the Attorney General*, the *Jackson* case, the *Sims* case make it
15 quite clear that Section 209(a) clearly bars Wyoming's attempt
16 to enforce any standard, and that clearly would encompass this.

17 Now, the argument that the other side makes is, *Well, we*
18 *have authority under Section 209(d)*. And that's the provision
19 dealing with in-use regulatory authority. And again, Congress,
20 in dividing authority between the states and the federal
21 government, said, *Well, states could control -- quote, control,*
22 *regulate, or restrict the use, operation, or movement of*
23 *registered or licensed vehicles.*

24 Clearly, that's true. And that would be something like
25 limiting idling of cars, car-pool lanes, taking the

1 emissions-control device out of a car.

2 But there is no precedent, whatsoever, for a stay
3 attempting to --

4 **THE COURT:** So let me can ask you this, Mr. Giuffra.
5 A number of states, by stipulation -- I think by your
6 stipulation, but you can correct me if I'm wrong; but I think
7 it was by stipulation -- remand -- I remanded a number of
8 states back to the state. I don't know. How many were there?

9 **MR. GIUFFRA:** Probably about -- I think it was about
10 ten or eleven, was my best recollection.

11 **THE COURT:** So wouldn't the decision in this case on
12 this motion inform -- that is, have some impact on -- how those
13 cases proceed?

14 **MR. GIUFFRA:** Yes, we would think so, Your Honor.
15 And we would think that those state courts that are looking to
16 see, *Well, what should we do on remand?* would look to see,
17 *Well, what did Judge Breyer do interpreting --*

18 **THE COURT:** They may choose to go the other way. I
19 mean, they're going to do what they think is proper.

20 But this decision, I would think, would speak to that
21 issue, as well.

22 **MR. GIUFFRA:** I would think so, Your Honor, as well.

23 There are roughly approximately a little bit more than --
24 I think there are 36 non-177 states.

25 There's probably a little bit -- somewhere around 15 that

1 are still pursuing claims. A number of the non-177 states have
2 abandoned and have never even brought these kinds of claims
3 against Volkswagen.

4 **THE COURT:** Have any of the actions -- the remanded
5 actions -- been adjudicated in terms of this issue?

6 **MR. GIUFFRA:** No, Your Honor. And I think people are
7 actually waiting to see how Your Honor rules on this issue, and
8 that's why you got all of the amicus briefs. We literally have
9 counties in Texas that have brought actions under their county
10 environmental laws against Volkswagen.

11 And, you know, Your Honor, the point to keep in mind is I
12 gave you that number about one point -- you know, you run the
13 math on the Wyoming penalties. It would be higher than the EPA
14 penalty Volkswagen paid, which was \$1.45 billion.

15 In terms of the remand cases, it was interesting. When
16 everyone -- when the state -- when the non-177 states were
17 trying to urge Your Honor to remand, and Your Honor granted the
18 remand because preemption is a defense, they all insisted that
19 they were not applying the federal definition of a defeat
20 device; but obviously that creates the conflict once you get
21 back into the state court. And it also creates the conflict
22 here, because if Wyoming has a definition of a contrivance or
23 device that has an effect on emissions, which is a broad, vague
24 regulation that bears no resemblance to the federal or
25 California definitions of defeat device, then that plays right

1 into the question of -- of conflict preemption, as well as,
2 again, we have express preemption.

3 **THE COURT:** I'd like to hear from Wyoming.

4 **MR. GIUFFRA:** Thank you, Your Honor.

5 **THE COURT:** Thank you.

6 **MS. MORRISSEAU:** May it please the Court.

7 Your Honor, we started this morning out with some banter
8 about history. And history is certainly important, but that's
9 not all there is, because there's got to be a first time for
10 everything. Now, the fact that there has never been a non-177
11 state bringing a case like there before is not an indication of
12 what the statute allows; it's only an indication of what's
13 happened before.

14 Now, one of the things that Volkswagen's counsel was
15 talking about just now is this idea of the 209 preemption,
16 basically saying that United States Congress decided that an
17 automobile manufacturer can get away with doing just about any
18 bad thing to a car, as long as they think about doing that bad
19 thing to a car before they sell it.

20 That's not right, for --

21 **THE COURT:** How do you get there?

22 I mean, I think now in the last two years this Court has
23 done a lot of things to Volkswagen, maybe by way of agreement;
24 but I don't think that anyone can come to the conclusion that
25 the litigation hasn't resulted in significant penalties to

1 Volkswagen. I think they're now up to somewhere in the
2 neighborhood of -- I would say 22- to \$25 billion. I don't
3 think you can look at that and say, *Well, Congress said you can*
4 *get away with it.* As a matter of fact, I think Congress said
5 the opposite. They said, *You can't get away with it.*

6 And I also think Volkswagen has recognized that. And they
7 actually recognized it on what I call "Day One," but they
8 recognize --

9 Maybe it's Day Two.

10 Maybe Day One was the disclosure by, by the way -- by both
11 the federal government and by CARB -- by California --
12 disclosed the existence of these defeat devices.

13 And after that, which would be Day Two, Volkswagen has
14 ended up -- admitted it.

15 And on Day Three -- you know, I'm telescoping the
16 calendar -- they've ended up paying 22- to 25 billion.

17 It's not over. I mean, there are other aspects of it, but
18 I don't know that I would subscribe to --

19 I accept your first argument, which is there has to be a
20 first case for everything. And I understand that. If there
21 weren't, then the law wouldn't develop at all.

22 But I think it's somewhat informative to say that there
23 are -- you know, the statute's been around a long time. It's
24 been around for some period of time. And there haven't been
25 this type of enforcement actions.

1 So I think that that, at least to a Court, is a flag. I
2 think it's a yellow flag, not a red flag. It's a yellow flag.
3 It says, *Well, it's been around for a while, and any Court*
4 *should proceed with some caution*, because if the Court
5 decides -- accepts your argument, that would be a first time
6 that the Court has accepted that argument.

7 But I'm troubled by my own reading of the preemption,
8 because it seems to me -- I was going to say "for a change." I
9 don't know if it's a change, or not. It seems to be very
10 clearly written. *No state* -- and that's Wyoming. We all
11 recognize that -- *shall adopt or attempt to enforce any*
12 *standard relating to the control of emissions from new motor*
13 *vehicles, or new motor vehicle engines*. I don't know how you
14 can say it any more clearer.

15 I don't think this is necessarily a case of implicit
16 preemption. I think it's explicit. How is it not explicit?
17 What, in your judgment -- and this may be a little unfair to
18 ask you, but if Congress wanted to preempt -- did not want
19 Wyoming, California, or any other state to bring an action of
20 this type -- how would they have written it? How would you
21 have suggested, if you were the legislative -- if you were
22 counsel instead of to the great state of Wyoming, you were
23 counsel to the Congress of the United States, how would you do
24 it?

25 **MS. MORRISSEAU:** Your Honor, they would have to add

1 an additional sentence that would say, *States may not assert*
2 *anti-tampering claims against automobile manufacturers.*

3 And that's where I was going with my original point, is
4 that what Wyoming is alleging Volkswagen has done is that they
5 have tampered with motor vehicles. And so it's not a question
6 about how the cars were designed in the first place. Wyoming
7 has no issue with how the cars are designed.

8 The way Wyoming's law at issue works is whatever controls
9 are on the car have to remain operational. And so it's
10 important.

11 Volkswagen really did three things here that matter.

12 The first thing they did was they designed vehicles that
13 contained pollution-control devices to meet the EPA standards.
14 We got exhaust gas recirculation. You've got a particulate
15 filter. You've got a lean trap, or a selective catalytic
16 converter. The first thing they did: They designed cars with
17 functioning pollution-control devices.

18 Then they made a decision that if those pollution-control
19 devices worked the way that they were physically designed to
20 work, the cars weren't going to perform the Volkswagen way. So
21 then they installed a computer program that would alter the
22 parameters, and turn off and turn down those pollution-control
23 devices when the cars are operating.

24 It's kind of like having a lookout. You know, when you've
25 got -- when there's cops on the street, you're not having money

1 and drugs exchanging hands. When the cops drive by, nothing
2 happens when they're present.

3 And that's like a test cycle. When the test cycle is
4 running, everything works just fine.

5 And so -- but I guess the important thing, really, is that
6 after all of that, they initiated a software recall, as well.
7 And what that software recall did was essentially recalibrate
8 the way that the computer programs worked, so that they would
9 turn off the pollution-control devices less frequently.

10 **THE COURT:** But the lookout is a means by which they
11 can accomplish the criminal offense.

12 **MS. MORRISSEAU:** Absolutely, Your Honor.

13 **THE COURT:** All right. So why isn't the emissions
14 device -- the defeat device a means by which they can subvert
15 the emissions control the standard? That's the mechanistic
16 means by which they are successful. A lookout is successful,
17 or not; but his or her job is to say, *Hey, the cops are coming.*
18 *Don't do X. Don't do Y, or They're coming from the right, and*
19 *you should go to the left.* You know, that's a means to
20 accomplish.

21 The purpose that --

22 I'm getting down into sort of the weeds of how it's
23 working, because I'm trying to understand your argument. So
24 you said, *Well, they have to add a sentence which says there*
25 *should be no device -- no emissions device.* So let's say they

1 figure out something else; some other way to do it, to
2 subvert --

3 Let's say they designed a device -- an emissions-control
4 device that would work, like, every tenth day, or every -- work
5 on some sort of different system from the present system. Not
6 a device, but simply the whole thing worked that way. I don't
7 know. It seems to me that that's a means by which they could
8 accomplish their illicit purpose, but you have to go back
9 actually to the basic argument, which is: Did Congress intend
10 to permit states to enforce these standards, as applied to
11 manufacturers?

12 And I just don't see it that way. I don't understand how
13 it works that way.

14 **MS. MORRISSEAU:** Well, I think to go back to your
15 point about the means, the fact is that Volkswagen tampered
16 with the vehicles, which in and of itself is a violation, in
17 order to hide their noncompliance with the new owner vehicle
18 standards.

19 Now, there are two different violations; and they don't
20 change the fact of the other.

21 And the other point -- the other important thing, as well,
22 is that Wyoming does not need to prove that Volkswagen violated
23 EPA's standard to prove that they tampered with --

24 **THE COURT:** Let's take a car. We used to have these
25 things called real speed limits, like, *You can't go over 65.*

1 *You can't go over 55, and so forth. Just say.*

2 Okay. So Volkswagen designs a car that can go 70 or 80,
3 but knows that in California or in the United States, you
4 cannot drive a car over 65 miles. So it puts a governor --
5 what we call "governors" -- on motor devices, so it just
6 doesn't work over 65.

7 Is that the installation of a device that then defeats the
8 speed limits, so if an individual wanted to remove it -- they'd
9 have a faster car -- they could do so without Wyoming, for
10 example, enforcing this type of law?

11 **MS. MORRISSEAU:** That's a tricky one, because with
12 speeding the driver him or herself has to actually step down to
13 increase the gas to the engine to get the car up to a certain
14 speed. And so regardless of what is installed on the car, the
15 consumer is really the one with the power to make that
16 decision.

17 But with the tampering devices that Volkswagen put on
18 these cars, the consumer isn't the one who's altering the
19 parameters that are feeding into the triggering device.

20 **THE COURT:** Maybe you demonstrated the weakness in my
21 argument, but I'm just trying to follow through it.

22 Anyway, I have to wonder whether Congress really wanted to
23 have 50 states or even other subdivisions start to enforce
24 these regulations. I mean, you could say, *Well, we're not*
25 *enforcing the regulations. What we're doing is enforcing our*

1 *laws in connection with tampering of the vehicle, but that's by*
2 *another name. I mean, that seems to be the way it's*
3 *characterized, rather than its purpose.*

4 *Its purpose here is to enforce the emissions-control*
5 *standard. If they were in compliance with the*
6 *emissions-control standard, you wouldn't have a case here.*
7 *Right?*

8 **MS. MORRISSEAU:** *Not necessarily. The tampering is*
9 *the problem. It's not the standard. And you can have a*
10 *situation where you can tamper with a vehicle, but you don't*
11 *violate the standard, and you've violated tampering.*

12 *For example, if they changed the parameters the trigger*
13 *when the particulate filter regenerates, then you might have a*
14 *situation where you've got increased engine wear and tear, and*
15 *you've got to be replacing engine parts more frequently. Well,*
16 *you don't necessarily go over the standard in terms of what's*
17 *the concentration of soot that's in your exhaust on any given*
18 *day.*

19 *And so that's -- I mean, that's really what this case*
20 *really comes down to, is it's a struggle between Congress*
21 *telling the states, *You don't get to design cars, but you do**
22 **get to control how they work on your roads.**

23 *And this question about, *What is tampering? And does it**
24 **matter that Volkswagen came up with these ideas at the time**
25 **they were designing the vehicles? Does it matter that they did**

1 *this software recall, or not?* I mean, you can look at the
2 question of how important tampering is to states. If you look
3 at different cases that get into, really, Fourth Amendment
4 questions of, *How can you seize a vehicle to do your standard*
5 *vehicle inspection?* a lot of those cases discuss the importance
6 of tampering to states. And so that's really what you're
7 wrestling with.

8 And the other thing that I think is important in the
9 context of this case and some of the different cases out there
10 related to what is and isn't preëmpting is that tampering is
11 really a physical analogue to fraud. Fraud is saying something
12 is what it is not. And then tampering is going ahead and
13 making something what it is not.

14 **THE COURT:** So your fraud argument is that the fraud
15 is -- that there's a common law, you know, tort: Fraud. I
16 mean, you can sue on that. And is it that it's a state claim
17 in connection with fraud? Is that your -- like they held in
18 New Jersey?

19 **MS. MORRISSEAU:** Well, I'm drawing an analogy to
20 those fraud cases. So there's the New Jersey case, but then
21 even if you look at *Cipollone*, what they allowed -- what they
22 determined was not preëmpted was your general fraud claim. And
23 so --

24 **THE COURT:** I found the New Jersey case very
25 interesting, even though it's -- there are all of these caveats

1 about not citing it, and so forth; but I think that more
2 properly, the New Jersey case raises issues that I have some
3 concern about, and concern that I think will be addressed, I
4 assume, in the remand motions that are going to be forthcoming
5 in -- but that it's not this case. It's not this case, but I
6 mean, the breadth of the New Jersey case is staggering, in
7 terms of the issues of preemption. And I think I'll probably
8 have to address that when I deal with the remand motions.

9 So I don't think it's -- I appreciate your citing it. I
10 know it's -- and I've found it informative, but I think it's
11 really informative of the and relevant to the state -- I mean,
12 to the remand motions which I'm going to hear in due course.

13 **MS. MORRISSEAU:** So I'd like to briefly talk about --

14 **THE COURT:** Sure.

15 **MS. MORRISSEAU:** Volkswagen's counsel talked about
16 how Wyoming's laws conflict with federal regulations about
17 automobile emission control devices, or AECDs.

18 Now, AECDs are essentially federally approved systems that
19 can turn off or turn down pollution-control devices for short
20 and discrete time periods. Now, Wyoming takes the use of these
21 federally approved AECDs into consideration when determining
22 what federally required pollution-control devices are at issue
23 on any given vehicle. So Wyoming could not enforce its
24 anti-tampering law against the proper use of an AECD, because
25 the proper use is part and parcel of the EPA's decision of what

1 pollution-control devices need to be on a particular car, and
2 how they ought to work.

3 And in any event, if there was a conflict between a valid
4 EPA regulation and a state law, that would trigger an
5 as-applied preemption challenge; but that's a red herring here,
6 because there's no direct conflict between the federal rules on
7 AECDs and Wyoming's anti-tampering rules.

8 So I'll briefly go to the some of the cases that
9 Volkswagen asserted were silver bullets. So first, there's the
10 *Jackson* case. This case is not on point, because the essence
11 of the preemptive claim was an attempt by private parties to
12 get damages from the violation of EPA's new motor vehicle
13 standards. It was just an attempt to directly enforce those
14 standards.

15 Then there's the *Sims* case. Now, that case was about
16 Florida's grey market car law, which forbids the registration
17 of imported vehicles, unless the EPA first issued a sort of
18 certificate of compliance, even if issuing such a certificate
19 was in conflict with EPA's own regulations on importing
20 vehicles. So that's not on point, as well.

21 And then there's the quashed New York Attorney General
22 subpoena. And, as you read in the New Jersey case, the
23 New Jersey Court didn't find that case to be particularly
24 appealing, for two reasons. One, the New York
25 Attorney General --

1 **THE COURT:** You're talking about now the New Jersey
2 case looking at the Attorney General?

3 **MS. MORRISSEAU:** The *Felix* case.

4 **THE COURT:** Right, yeah.

5 **MS. MORRISSEAU:** In the *Felix* case --

6 **THE COURT:** But the problem is, number one, I don't
7 necessarily find the *Felix* case persuasive of anything. And,
8 number two, I don't think I should look at it, because *Felix* --
9 they said that I shouldn't -- that is, the *Felix* Court said I
10 shouldn't, so I don't think I should look at that.

11 And the fact is that the *Felix* Court disapproves of the
12 Attorney Generals case in New York, well, that's -- I
13 understand that. I understand that. Some Courts think that
14 the other Court's wrong. That happens all of the time. Some
15 Courts think I'm wrong. Some Courts think, fortunately, that
16 I'm right, but I don't know. I mean, I'm not going to look at
17 the *Felix* case and think, *Oh, that's rather persuasive as to*
18 *the Attorney Generals case.*

19 **MS. MORRISSEAU:** Sure. So without looking at the
20 *Felix* case, if you looked at the quashed subpoena, itself, what
21 the subpoena was, was an attempt to get every single document
22 that the companies had provided to EPA as part of EPA's
23 enforcement. It was a direct attempt to enforce federal
24 emissions standards. And so that's why that one was quashed.

25 **THE COURT:** But is it the direct attempt, or the

1 indirect attempt? I mean, where do I draw the line between
2 direct and indirect?

3 I could understand drawing lines between explicit and
4 implicit preemption. You have to do that.

5 But I don't know that there's a real line between a direct
6 attempt to enforce a standard, and an indirect. If I look at
7 the preemption language, it doesn't distinguish between direct
8 and indirect. If you indirectly attempt to enforce a standard,
9 it's been preempted. Because you can do something by
10 indirection, doesn't -- it doesn't obviate the impact of a
11 preemption argument, because there's always an indirect way to
12 do something. You can say, *I can't go in a straight line, so*
13 *I'm going to go in a crooked line, and it's going to have the*
14 *same impact.*

15 You look at impact. You look at purpose. You look at
16 intention. You look at all those things to try to figure out:
17 What are you doing?

18 And I don't think it's an answer to an argument to say,
19 *Well, by the way, we're doing it indirectly. It's okay.*

20 **MS. MORRISSEAU:** Sure. I mean, the distinction is
21 whether it's a new vehicle, or whether it's a used vehicle.
22 And so that's where the tampering really gets to.

23 And so in the *Allway Taxi* case -- that was one where a
24 New York City regulation that established both fuel standards
25 and emission-control standards was upheld. Now, there was some

1 conversation that -- I mean dicta, really, about when it is
2 that a car changes from being new to used, and when you can
3 go -- when you can regulate that used car; but that's all
4 dicta, because in that case the regulation, itself, was upheld.

5 And another case that really matters -- and the one that
6 Volkswagen hasn't addressed in its Reply -- is the *Counts*
7 *versus General Motors*. Now, that comes out of the
8 Eastern District of Michigan just a few months ago. And in
9 that case plaintiffs brought consumer-protection and fraud
10 allegations against General Motors related to a defeat device
11 installed in the Chevy Cruze that operated similar to the
12 computer programs at issue in this case. And in the *Counts*
13 Opinion, they referenced some of the different orders that have
14 come out in *Volkswagen* litigation, because they're so closely
15 interrelated.

16 And in that case, the plaintiffs -- they survived a motion
17 to dismiss because the Court determined that their claims
18 didn't directly -- they didn't directly rely on proving
19 noncompliance with the EPA standards, so the EPA standards were
20 irrelevant to the case before the Bar.

21 And that's analogous to Wyoming's case before you today.
22 Our case does not rise or fall on whether the standards were
23 violated. Our case rises and falls on whether the vehicles
24 were tampered with.

25 **THE COURT:** Okay. Let me hear the response to that

1 case. Thank you.

2 **MR. GIUFFRA:** Your Honor, I actually think Wyoming's
3 counsel just made our case for us, because she couldn't imagine
4 a clearer case of conflict preemption than Wyoming wanting to
5 enforce its own emissions laws, notwithstanding Section 209(a).

6 And, in fact, Your Honor, if you look at the peripheral
7 relief in the Wyoming Complaint on paragraph B at page 49, they
8 say they'd like to have -- one of the things they seek is a
9 schedule to bring all of the subject vehicles into compliance
10 with Wyoming State air-quality laws, and the Wyoming State
11 Implementation Plan. And then they also seek, in the
12 alternative, an emissions mitigation plan to offset any excess
13 emissions that can't be directed. So --

14 **THE COURT:** Well, but okay. Let's get to Counsel's
15 point here that -- her last argument is, Look. We're not
16 enforcing --

17 The Complaint is one thing. Let's just put that aside for
18 the moment, though it is what we're here to discuss,
19 supposedly: Dismiss the Complaint. So what it says is
20 relevant.

21 But putting that aside for the moment, and treating her
22 argument seriously, it is, *Look. Whether they're in*
23 *compliance/not in compliance with the EPA standards, or the*
24 *SIP, I guess, so what? We're here about a tampering device.*
25 *This engine has been tampered with, and therefore the exhaust*

1 *system has been tampered with. Therefore, that's what the case*
2 *is about, and we're seeking damages as a result of the*
3 *tampering. Whether they were in compliance with the EPA*
4 *standard or not, who cares?*

5 I mean not "Who cares," but, *That's not our case. Our*
6 *case is: You tampered with the engine.*

7 Okay. What's the answer to that part?

8 **MR. GIUFFRA:** The answer to that argument is, Your
9 Honor, if this were a situation where we tampered with the
10 vehicle, you know, if some auto shop tampered with it in an
11 emissions-control system in the state of Wyoming, they might
12 have something, because under Section 209(d) it says states
13 can, quote, *control, regulate, or restrict the use, operation,*
14 *or movement of registered and licensed vehicles.*

15 Well, these vehicles were not registered or licensed at
16 the time the defeat device was put in them.

17 In fact, if you look at paragraphs 104 to 108 of the
18 Complaint, it talks about how the defeat devices were installed
19 in Germany, and they were an integral part --

20 **THE COURT:** So the argument in response to that, I
21 think, is what you said. It is, *Look. The way the car is*
22 *manufactured with its intricate interrelationship, workings,*
23 *and so forth -- that's what is the given. And it can't be*
24 *subject to a separate state-court lawsuit as it relates to*
25 *emissions because of the Clean Air Act preemption.*

1 It is, *We look at the entire system. And the entire*
2 *system -- that is the emissions system, with all of its moving*
3 *parts, its defeat devices, its enabling devices, and so forth.*
4 *That's what the subject of federal regulation.*

5 After that, when the car is being used, oh, you take out
6 the titanium screws, and you put in the iron screws; or you do
7 this, or that, or disconnect something, and so forth.

8 For example, I suppose if they ran it into a VW dealer and
9 said, *By the way, would you mind just disconnecting this device*
10 *in my car?* You know. And the VW people did that.

11 I'm not suggesting they did; but of course, that could be
12 subject -- that's a change in the use of the vehicle after it
13 has gone through the process.

14 And there's no workable way to have a nationwide system of
15 enforcement if you are going to allow 50 states to take -- to
16 disassemble the system in some way, or point out one part or
17 another part of a wholly integrated system.

18 And that, I think, is -- at least, in my tentative
19 thinking -- how the argument goes. Now I have to think more
20 about it, and I have to consider counsel's views in that
21 regard; but that's the way I sort of look at it. The tampering
22 is not the manufacturer's.

23 **MR. GIUFFRA:** Yes. And there's a distinction between
24 that, Your Honor.

25 And the problem would be, just to give you an example, in

1 the settlement that we've reached that this Court entered, we
2 agreed that for the 2-liter cars, they could be on the road and
3 operated at a standard than was lower than the original
4 certified standard. What would happen if Wyoming said, *Well,*
5 *we really want you to comply with the originally certified*
6 *standard.* Could they bring an enforcement action to disrupt
7 the settlement as it applied in Wyoming? We'd all say, *Of*
8 *course not. That would make no sense.*

9 Let me make a couple of observations on the fraud claim.
10 People mix and match the environmental enforcement action,
11 which is what we're talking about here, with some sort of
12 consumer-fraud claim. As I indicated before, to the extent
13 there was any misrepresentation made to any Wyoming resident,
14 and there's a Wyoming statute that gives the Attorney General
15 the ability to go after a manufacturer or distributor of a car
16 who made a misrepresentation in their advertising, we settled
17 that claim with Wyoming, and we paid them money; I believe
18 \$1,100 a car. And we have a release for that claim. So the
19 claim for misleading the consumers of Wyoming has been settled.

20 The only claim that we're here about now is whether they
21 can bring an environmental enforcement action. And the courts
22 all have said that you can't do it against the manufacturer,
23 because even if there was a defeat device at the car at the
24 time of manufacture, that's not a tampering with a vehicle
25 after it's been registered or licensed.

1 Now, a comment was made before about the 2014 software
2 recall. And that's at paragraph -- I would direct the Court to
3 paragraph 152. And paragraph 152 alleges that that software
4 recall had the effect of lowering the emissions on the cars.
5 It did not increase the emissions on the cars.

6 In any event -- in any event, courts, including the
7 *New York Attorney General* case, have all said that's something
8 that goes to the design of the car. It's -- we do say a
9 software-update-type situation that relates back to the
10 original design of the car. In the original design of this
11 car, it always had a defeat device in it. It was designed with
12 a defeat device in it.

13 The auto emissions -- to the extent that there was a
14 misrepresentation made to a government agency, it was made to
15 EPA and CARB, who were responsible for doing the testing.
16 Wyoming doesn't test cars.

17 And one other point that I think is an important one:
18 When you really step away from it, what Wyoming wants to do is
19 just get an additional penalty for Volkswagen's violations of
20 federal law. And the Supreme Court, in cases like the Arizona
21 case in the context of immigration, the *Buckman* case in the
22 context of the FDA, the *Gould* case in terms of the federal
23 labor-law standards, have all said that these sorts of state
24 copycat, pile-on type of enforcement actions conflict with
25 federal law, because federal law sets a set of rules; a

1 standard. Federal law, the penalty's \$37,500 per car forever.

2 States -- Wyoming wants 37,500 per day.

3 And there really is no -- in allowing Wyoming to bring
4 this, and other non-177 states to bring these kinds of state
5 enforcement actions in the face of Section 209(a) --

6 And, in fact, when you look at 209(d), which actually does
7 give them the ability, if someone does tamper with the device
8 in the state after the car's been registered --

9 -- but it would make it impossible in the future for auto
10 manufacturers to actually enter into the kinds of global
11 settlements that Volkswagen did, because we were able to work
12 with the EPA and work with CARB, and have a penalty regime that
13 made some sense.

14 And, as Your Honor pointed out, it's hard to imagine a
15 situation where a manufacturer has been penalized as much as
16 Volkswagen has. I think you're correct. The number's between,
17 I think, \$22 million and counting, in terms of how much has
18 been paid. And, you know, on the penalties side, alone, for
19 the federal side, there was \$1.45 billion.

20 So we think that clearly Section 209(a) applies here. All
21 of the case law supports the application of 209 to -- (d) --
22 this claim, to be a preëmptive one. And we -- as I mentioned
23 before, we settled the consumer fraud claim with Wyoming.

24 So we urge Your Honor to dismiss this case; to dismiss it
25 with prejudice. And we're hopeful that Your Honor's decision

1 will be looked at by some of the other courts that have the
2 cases.

3 **THE COURT:** Well, that depends on my decision.

4 **MR. GIUFFRA:** If Your Honor agrees that
5 Section 209(a) applies --

6 **THE COURT:** If I agree with you, you're hopeful that
7 it will be looked at.

8 **MR. GIUFFRA:** That's true.

9 **THE COURT:** And if I disagree with you, you're less
10 hopeful.

11 **MR. GIUFFRA:** I'm less hopeful. Supreme Court before
12 I'm over. Thank you very much.

13 **THE COURT:** All right. Thank you. The matter's
14 submitted. Thank you.

15 (At 10:00 a.m. the proceedings were adjourned.)

16 I certify that the foregoing is a correct transcript from the
17 record of proceedings in the above-entitled matter.

18

19 

20 _____ August 1, 2017

21 Signature of Court Reporter/Transcriber Date

22 Lydia Zinn

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