



DEBORAH R. HENSLER, JASMINKA KALAJDZIC, PETER CASHMAN,
MANUEL A. GÓMEZ, AXEL HALFMEIER, IANIKAZANKOVA

The Globalization of Mass Civil Litigation

Lessons from the Volkswagen “Clean Diesel” Case



For more information on this publication, visit www.rand.org/t/RR917-1.

About RAND

The RAND Corporation is a research organization that develops solutions to public policy challenges to help make communities throughout the world safer and more secure, healthier and more prosperous. RAND is nonprofit, nonpartisan, and committed to the public interest. To learn more about RAND, visit www.rand.org.

Research Integrity

Our mission to help improve policy and decisionmaking through research and analysis is enabled through our core values of quality and objectivity and our unwavering commitment to the highest level of integrity and ethical behavior. To help ensure our research and analysis are rigorous, objective, and nonpartisan, we subject our research publications to a robust and exacting quality-assurance process; avoid both the appearance and reality of financial and other conflicts of interest through staff training, project screening, and a policy of mandatory disclosure; and pursue transparency in our research engagements through our commitment to the open publication of our research findings and recommendations, disclosure of the source of funding of published research, and policies to ensure intellectual independence. For more information, visit www.rand.org/about/principles.

RAND's publications do not necessarily reflect the opinions of its research clients and sponsors.

Published by the RAND Corporation, Santa Monica, Calif.

© 2021 RAND Corporation

RAND® is a registered trademark.

Cover: imac27 Studio/Getty Images/iStockphoto (Map); spawns/Getty Images/iStockphoto (Gavel)

Limited Print and Electronic Distribution Rights

This document and trademark(s) contained herein are protected by law. This representation of RAND intellectual property is provided for noncommercial use only. Unauthorized posting of this publication online is prohibited. Permission is given to duplicate this document for personal use only, as long as it is unaltered and complete. Permission is required from RAND to reproduce, or reuse in another form, any of its research documents for commercial use. For information on reprint and linking permissions, please visit www.rand.org/pubs/permissions.

About This Report

The RAND Institute of Civil Justice (ICJ) and the Kenneth R. Feinberg Center for Catastrophic Risk Management and Compensation have a long history of studying aggregate litigation. We were therefore delighted when Professor Deborah Hensler, one of the foremost experts on this subject (as well as a long-time board member and former director of the ICJ), suggested a collaboration between the RAND Corporation and Stanford Law School on a conference to study one of the more intriguing examples of this type of litigation, the recent Volkswagen (VW) “clean diesel” case, a global litigation that proceeded in parallel in multiple national jurisdictions. Many scholars and practitioners believe that this sort of transnational litigation represents the future of mass litigation.

We were fortunate to gather a group of distinguished participants from across the civil justice system and around the globe—many of whom played key roles in the VW litigation—who were able to provide diverse viewpoints and inspire thoughtful dialogue. This report summarizes their discussion, which took place in April 2019 at Stanford Law School. Resolution of the VW litigation has followed different procedural paths in different jurisdictions and—not surprisingly—reached different outcomes. As background for our summary of the roundtable discussion, this report describes the procedural mechanisms that are available to resolve mass civil litigation in the jurisdictions represented at the workshop, as well as the progress and outcomes of the VW litigation in these jurisdictions through June 2020. As is revealed in these pages, although the roundtable participants were keenly interested in the challenges presented by global parallel litigation, few were prepared at this time to suggest procedural reforms that would coordinate such litigation. Instead, participants called for more empirical research and ongoing sharing of experiences and perspectives on this evolving form of mass litigation. We hope that RAND will contribute to this research and sharing of perspectives in the future.

The RAND Kenneth R. Feinberg Center for Catastrophic Risk Management and Compensation

The Feinberg Center seeks to identify and promote laws, programs, and institutions that reduce the adverse social and economic effects of natural and manmade catastrophes by improving incentives to reduce future losses; providing just compensation to those suffering losses while appropriately allocating liability to responsible parties; helping affected individuals, businesses, and communities to recover quickly; and avoiding unnecessary legal, administrative, and other transaction costs.

Questions or comments about this report should be sent to the project leader, Lloyd Dixon (dixon@rand.org). For more information about the Feinberg Center, see www.rand.org/ccrmc or contact the director at ccrmc@rand.org.

Funding

Funding for this research was provided by the generous contributions of the RAND Kenneth R. Feinberg Center for Catastrophic Risk Management and Compensation Advisory Board.

Acknowledgments

The coauthors and organizers of the Stanford-RAND roundtable wish to thank the participants in the Volkswagen litigation who have generously shared their time and information with us, all those who participated in the roundtable, and our colleagues who have contributed over the years to our knowledge about global mass civil litigation. We would also like to thank the peer reviewers, Michelle Grisé and Roger Trangsrud, for their comments and suggestions and participants at the roundtable who offered additional information and explanations to this report.

Summary

As mass civil litigation has grown within legal jurisdictions, a new form of transnational mass litigation, which we term *global litigation*, has emerged. This litigation is characterized by parallel proceedings in multiple national jurisdictions, arising out of the same or similar factual circumstances. It typically targets the same or related multinational corporations but is brought on behalf of domestic plaintiffs, under different domestic substantive laws and applying different domestic legal procedures. The Volkswagen (VW) litigation over vehicles that were fitted with engine management software intended to mislead emission-monitoring regimes is a prime example of global litigation.

This report seeks to use the VW litigation to better understand the features of global litigation and the problems that arise in the resolution of these types of claims. Such information can provide a foundation for developing reforms that can improve speed, equity, and efficiency. The report provides an overview of the procedural mechanisms that are available to resolve mass civil litigation in Australia, Brazil, Canada, Chile, Germany, the Netherlands, and the United States, countries that have well-developed representative or aggregate litigation procedures that judges, lawyers, and parties have relied on to resolve the massive number of claims that emerged against VW. It also provides an overview of the VW litigation in these jurisdictions through June 2020. In addition, we summarize key themes that arose during an April 2019 roundtable on global litigation sponsored by Stanford Law School, the RAND Institute for Civil Justice, and the RAND Kenneth R. Feinberg Center for Catastrophic Risk Management and Compensation.

Today, virtually every large industrial nation has some sort of group or collective procedure for resolving mass claims; however, the structure of these procedures varies tremendously across jurisdictions. At the time of the roundtable, most of the VW litigation was still ongoing, although the shape of the outcomes in the United States and Canada had become quite clear. The Australian litigation was still being fiercely contested by VW, and while securities litigation was well under way in Germany using the special Kapitalanleger-Musterverfahrensgesetz (KapMuG; Capital Market Investors' Model Proceedings Act) procedure, it was not clear whether the new model declaratory action for consumer claims would substantially benefit VW purchasers there. By carrying the story of the lawsuits against VW forward beyond the date of the roundtable, we are able to suggest some of the consequences of procedural variation.

The roundtable discussion suggested that the VW litigation is not a "one-off." Indeed, many participants thought that something similar is likely to occur again—albeit with a different set of facts, claimants, and potentially liable parties. There was also a sense that victims of the same event or wrongdoing in different countries seem increasingly to believe that they deserve the same (most generous) compensation that victims in other countries have received, without regard to differences in substantive law or regulation. This phenomenon is driven by the availability of information about events outside one's own country via mass and social media. It also became clear during the discussion that, compared with the

plaintiff and defense counsel, public regulators, and nongovernmental organization representatives among the roundtable participants, the judicial participants felt least well informed about how the VW litigation progressed outside their own jurisdictions and most desirous of new mechanisms for information sharing. Finally, many participants thought that national approaches to mass claims would ultimately converge on something more like the U.S. aggregate and collective litigation model than conventional civil litigation in civil law regimes, notwithstanding their own and others’ criticisms of the U.S. model. Few participants were ready at this time to suggest reforms that would coordinate global parallel litigation. Instead, a majority called for more empirical research and information sharing in the future.

What the consequences of globalizing mass civil litigation are for claimants, defendants, and society at large have yet to be studied systematically. Although incidences of global civil litigation have led a few commentators to call for a new international court to resolve such lawsuits, it is unlikely that such an institution will be established any time soon. The report suggests areas for further investigation but leaves many questions open for further research and debate.

Contents

| | |
|---|-----|
| About This Report | iii |
| Summary | v |
| | |
| CHAPTER ONE | |
| Introduction | 1 |
| | |
| CHAPTER TWO | |
| The Stanford-RAND Roundtable | 5 |
| | |
| CHAPTER THREE | |
| Overview of Group Procedures and Collective Resolution Mechanisms | 7 |
| The United States | 8 |
| Canada | 9 |
| Australia | 11 |
| Germany | 15 |
| The Netherlands | 16 |
| Brazil | 18 |
| Chile | 20 |
| Summary of Procedural Variation Across the Seven Jurisdictions | 22 |
| | |
| CHAPTER FOUR | |
| Overview of the Volkswagen Litigation: The United States, Canada, Australia, Germany, the Netherlands, Brazil, and Chile | 25 |
| The United States | 26 |
| Canada | 35 |
| Australia | 39 |
| Germany | 42 |
| The Netherlands | 48 |
| Brazil | 50 |
| Chile | 53 |
| Summary of VW Litigation Progress and Outcomes in Seven Jurisdictions | 55 |
| | |
| CHAPTER FIVE | |
| Lessons from the Volkswagen “Clean Diesel” Litigation | 59 |
| | |
| APPENDIX | |
| Attendee List | 67 |
| | |
| Abbreviations | 69 |
| Bibliography | 71 |

Introduction

In the wake of the Volkswagen Group's 2015 announcement that certain models of the Volkswagen (VW) diesel automobiles were fitted with engine management software that produced misleading emission control reports when the automobiles were attached to test equipment, consumer and shareholder lawsuits were filed in many parts of the world.¹ In some jurisdictions, government officials also launched regulatory and criminal investigations. Much of this litigation and public enforcement activity has been concluded, but some is ongoing. These thousands of legal proceedings—from individual investor claims in Germany to consumer class actions in Australia—are prime examples of the growing phenomenon of global mass civil litigation.

Transnational dispute resolution involving parties from different countries has a long history, reflecting the prevalence of international commerce. Because of differences in domestic law and practice and the lack of an international treaty guaranteeing the global enforcement of judicial decisions, the different nationalities of parties almost invariably complicate dispute resolution. As a result, in the commercial context, parties usually turn to contractually based private arbitration to facilitate resolution.² However, transnational litigation occurs as well when disputants are not parties to any predispute contract and hence have limited opportunity to avail themselves of arbitration. As mass civil litigation has grown within legal jurisdictions, a new form of transnational mass litigation, which we term *global litigation*, has emerged. This litigation is characterized by parallel proceedings in multiple national jurisdictions, arising out of the same or similar factual circumstances and targeting the same or related multinational corporations—but brought on behalf of domestic plaintiffs, under different domestic substantive laws, and applying different domestic legal procedures.

The VW litigation is a prime example of this form of global litigation. Although the facts that gave rise to this private litigation and public enforcement activity were specific to VW, the legal scenario is not. In a globalized economy in which products and services are manufactured and sold worldwide, problems associated with these products and services inevita-

¹ In the popular press and many legal documents, this software was referred to as a *defeat device*.

² See, e.g., Margaret Moses, *The Principles and Practice of International Commercial Arbitration*, 3rd ed., Cambridge, UK: Cambridge University Press, 2017. Transnational disputes are also complicated by other factors, including the occurrence of events that gave rise to the dispute in multiple jurisdictions other than the home countries of disputants and the presence of defendants' assets in multiple jurisdictions.

bly affect residents and legal institutions in many jurisdictions: Purchasers of these products and services are harmed, sometimes in identical ways; charges of legal violations frequently follow; private civil litigation ensues; and public enforcement activities are initiated sometimes before and sometimes following the initiation of private litigation. Multinational corporations find themselves defending against legal claims in courts in different countries, with different jurisdictional doctrines, procedural mechanisms, decisionmakers, and damage rules—to name just a few differences. Although, in principle, each jurisdiction takes charge of its own legal claims and addresses them according to its own rules, in practice, lawyers for the plaintiffs and defendants share information and may coordinate strategies across jurisdictions. Judges in one jurisdiction are aware of how judges have resolved cases in other jurisdictions, and journalists and social media transmit information about the outcomes of litigation from one place to another, thereby shaping expectations of plaintiffs in different countries. In effect, the defendant faces a global litigation battle, albeit in the guise of many parallel proceedings, which often requires a coordinated legal and risk management strategy aided by global law firms, crisis management teams, lobbyists, and other players. Often, litigation strategies need to be complemented by strategies that respond to regulatory and criminal investigations, as the defendant’s responses to the latter influence the course of the former and vice versa.³

What can we learn from the VW litigation about the future of global mass civil litigation? Are there formal rules or informal practices that could improve this process, making it more efficient and fairer for both plaintiffs and defendants? What role is third-party litigation funding playing in the global litigation phenomenon? Do collective litigation mechanisms facilitate or further complicate resolution of global cases? Should documents produced on discovery in one jurisdiction be available to litigants in other jurisdictions? How can domestic courts adjust to the phenomenon of global litigation while at the same time preserving their own legal culture and autonomy? What peculiar legal problems are created by parallel proceedings in different jurisdictions, and what are the possible solutions? Is there a need for some sort of international body to coordinate, albeit not decide, parallel litigation arising out of the same matter? Do we need better mechanisms for sharing information across national boundaries about how different legal institutions are responding to similar disputes? Can we draw any lessons from the VW litigation about the merits and demerits of relying on public versus private enforcement for consumer protection? Is there a process by which any of these questions can be debated, let alone resolved?

³ In the midst of the COVID-19 pandemic, many commentators predicted a sharp decline in global trade. But the pandemic itself has demonstrated the reliance of public, as well as private, institutions on global supply chains: As hospitals in Western Europe and North America scrambled to gather supplies for treating the victims of the virus, they turned to China for masks, ventilators, and other medical necessities. At the same time, multinational teams collaborated on the development of new vaccines. Although global marketing might have dipped in the short term, it would take more than a pandemic to reverse the centuries-long expansion of transnational economic activity. In short, even if the pandemic disrupts the global economy in the short term, it is unlikely to presage a turning back to purely domestic litigation.

To begin a dialogue about these questions, we invited a small group of judges, lawyers, corporate officials, legal analysts, and scholars involved or engaged in studying the VW “clean diesel” litigation to participate in an informal, one-day roundtable discussion at Stanford Law School in April 2019. In addition to the United States, the participants came from (or reported on) Australia, Brazil, Canada, Chile, Germany, and the Netherlands, all jurisdictions that have relatively well-developed procedures for addressing mass litigation and that have seen significant litigation arising out of the VW “clean diesel” scandal. The gathering was cosponsored by Stanford Law School, the RAND Institute for Civil Justice, and the RAND Kenneth R. Feinberg Center for Catastrophic Risk Management and Compensation. The roundtable discussion provided a unique opportunity for the participants to share their experiences, expertise, and observations about global civil litigation.

Discussing high-stakes litigation while it is ongoing is sensitive. As a result, we emphasized to participants that the purpose of the meeting was not to try the VW case but rather to discuss what those who had been involved in it had learned about global mass civil litigation generally. We were pleased with the enthusiasm for discussion that the participants exhibited during the day. We learned a lot about jurisdictional differences and similarities in response to mass civil litigation and attitudinal differences about the causes and consequences of these differences. However, the hope that proposals for reform might emerge from the discussion proved premature. Before proposing global solutions to shared problems, participants within domestic legal regimes need to understand more about how different jurisdictions are currently addressing those problems. Rather than provoking reform proposals, the roundtable provided an opportunity for participants to share information, experiences, and perspectives and led to a call for future transnational discussions.

Our original intent for this report was simply to summarize the April 2019 discussion. But, as time passed, some countries amended their procedural mechanisms for resolving mass litigation, in part in response to VW claims, and some jurisdictions resolved the litigation that was still ongoing at the time of our workshop. Therefore, we expanded our objectives for the report to include updated descriptions of the procedural mechanisms that are available to resolve mass civil litigation in the jurisdictions represented at the workshop and detailed descriptions of the progress and outcomes of the VW litigation in these jurisdictions.

The report consists of five chapters. Chapter Two describes the purpose and format of the roundtable. Chapter Three describes the legal procedures that can currently be deployed in mass claim situations in the countries represented at the workshop, focusing on collective and aggregate procedures. Chapter Four summarizes the status of the VW litigation and public enforcement initiatives in Australia, Brazil, Canada, Chile, Germany, the Netherlands, and the United States. Chapter Five discusses the lessons that emerged from the roundtable discussion.

The Stanford-RAND Roundtable

The idea for the roundtable emerged from discussions among the authors of this report, who have been teaching and conducting comparative research on collective litigation together for more than a decade and are experts on the civil justice systems that were represented at the roundtable.¹ As litigation arising out of the “clean diesel” scandal arose in each of our countries, we recognized that it presented a natural case study for comparing how various jurisdictions address incidents of mass harm and investigating the consequences of parallel worldwide litigation. By bringing together jurists, counsel for plaintiffs and defendants, and academicians, we hoped to jump-start such a case study and facilitate transnational communication about the litigation. Stanford Law School, which cosponsored a series of international conferences on the globalization of class actions from 2007 to 2011,² was a natural venue for the roundtable. RAND’s long history of studying mass tort litigation, class actions, and mass compensation systems made it a natural partner in this initiative. Ultimately, the RAND Institute for Civil Justice, the RAND Kenneth R. Feinberg Center for Catastrophic Risk Management and Compensation, and Stanford Law School agreed to cosponsor the event.

In the fall of 2018, we sent invitations to judges and lead counsel for plaintiffs and VW defense counsel in Australia, Canada, Germany, the United States, and the Netherlands; non-governmental organizations that have been active in or closely following the VW litigation in their countries; third-party litigation funders who are active in the global dispute resolution arena; regulators; and corporate counsel (including insurance industry representatives) who are active in global litigation, although not currently engaged in the VW “clean diesel” litigation. We rounded out the invitation list with legal scholars who had been following the VW litigation in their respective countries, plus a scholar who has been following the litigation in Brazil and Chile. The invitees’ responses were overwhelmingly positive. Two conditions

¹ See Deborah R. Hensler, Christopher Hodges, and Ianika Tzankova, eds., *Class Actions in Context: How Culture, Economics and Politics Shape Collective Litigation*, Cheltenham, UK: Edward Elgar Publishing Limited, 2016. A number of the authors of this report contributed to this book, which also includes contributions from other international scholars.

² See Deborah R. Hensler, Christopher Hodges, and Magdalena Tulibacka, eds., *The Globalization of Class Actions*, Thousand Oaks, Calif.: SAGE Publications, 2009. For later information on the spread of class actions, see Stanford University, “Global Class Actions Exchange,” webpage, undated.

to the roundtable likely played a significant role in securing participation. First, participants were assured that the purpose of the roundtable was not to debate the guilt or liability of VW in the “clean diesel” scandal. Second, the roundtable was conducted under modified Chatham House confidentiality rules; ideas and information at the meeting could be disclosed, but nothing said could be attributed to participants or the entities with which they are affiliated. A list of all participants is included as an appendix.

Overview of Group Procedures and Collective Resolution Mechanisms

A defining characteristic of global mass civil litigation is that, although it arises out of the same facts—alleged personal injuries, property damage, or financial losses associated with a product or service manufactured or provided by one or a few corporations—the substantive laws underlying the claims and the procedural rules and practices for addressing them vary from jurisdiction to jurisdiction. The legal position is further complicated by the fact that *choice of law* rules also vary from jurisdiction to jurisdiction. When there are large numbers of claims, as in the VW “clean diesel” litigation, whether the jurisdiction permits aggregate proceedings or offers representative collective resolution mechanisms and, if so, the nature of these procedures is of key importance. Up until about 2000, only a few jurisdictions included representative collective resolution mechanisms—typically termed *class actions*, *group actions*, or *collective actions*—in their rules. Today, virtually every large industrial nation and an increasing number of developing nations have some sort of aggregate or collective procedure for resolving mass claims. However, the structure of these procedures varies tremendously across jurisdictions.¹ When VW disclosed that the software for “clean diesel” vehicles was designed to fool emission testing equipment into registering compliance with environmental regulations in some countries,² litigation against VW burgeoned around the world. As the following descriptions reveal, however, consumers and investors who claimed to have been harmed by VW’s actions had very different procedures available to them for resolving their claims against the company. The features of these procedures may facilitate or hinder the use of the procedure—often, deliberately so. In this chapter, we briefly describe the key characteristics of the procedures available for collective resolution of mass claims, including both representative procedures (popularly termed *class actions*) and procedures that aggregate individual claims for some or all stages of the litigation process. Moreover, every jurisdiction has rules regarding how legal fees are distributed between winners and

¹ For a review of design differences in collective mechanisms generally, see Deborah R. Hensler, “From Sea to Shining Sea: How and Why Class Actions Are Spreading Globally,” *Kansas Law Review*, Vol. 65, 2017.

² As discussed at the roundtable, environmental regulations differ among jurisdictions. Whether VW’s “clean diesel” vehicles violated regulations of different jurisdictions was a key issue in the domestic litigation that ensued in some jurisdictions.

losers, who is allowed to fund litigation, and how lawyers are paid. These rules interact with the features of collective and aggregate procedures to further support or hinder the use of the procedures. We conclude this chapter with a table comparing the key features of each jurisdiction’s procedure.

The United States

Federal and state courts in the United States have long offered procedures for collectively resolving similar claims arising out of the same facts and law. The modern form of the U.S. class action is spelled out in federal Rule 23 and its state counterparts.³ Briefly, when there are numerous claims that share common features, a judge may certify the litigation to proceed as a class action. One or a few members of the class who the judge determines are typical of other class members and have the ability (including resources) to adequately represent class members’ interests may maintain the action. Class actions may seek injunctive relief or damages. Class actions for damages must satisfy an additional set of criteria, the most important of which are that common issues must *predominate* over individual issues and that the class action must offer a *superior* means of resolving multiple claims.⁴ Like other U.S. procedural rules, the class action rule is transsubstantive, meaning that it applies to virtually all areas of civil law, assuming that the claims at issue meet the specified procedural criteria. In practice, however, as a result of a 1997 U.S. Supreme Court decision,⁵ few personal injury lawsuits are certified as class actions.

In civil litigation in the United States, each side bears its own costs, win or lose. Private class actions are typically funded by plaintiff class counsel. Third-party litigation funding is becoming more common in U.S. civil litigation but does not yet appear to be a major factor in class actions. Rule 23 requires that the judges presiding over the case appoint class counsel and award fees and expenses at the end of the proceeding, if the class prevails. If defendants prevail, plaintiff counsel do not recover fees and therefore suffer out-of-pocket losses, which can be substantial. Proposed settlements must be approved by the judge after notice to class members and a public hearing on the fairness, reasonableness, and adequacy of the settlement. In Rule 23 (b)(3), on damage class actions, class members who wish to pursue their claims individually must be given an opportunity to opt out; those who choose to remain within the class may object to the terms of the settlement, including proposed attorneys’ fees.

³ Federal Rules of Civil Procedure, Rule 23, Class Actions.

⁴ The U.S. Supreme Court’s recent class action jurisprudence has significantly raised the bar for class certification. Available data indicate that, in recent years in the federal courts, many complaints filed in the form of a class action never reached a certification decision; of those that did, about half were denied certification. Virtually all of the remainder were certified for settlement purposes only, with the support of both class claimants and the defendant.

⁵ *Amchem Products, Inc. v. Windsor*, 521 US 591 (1997).

After the case is finally disposed, objectors may appeal judicial decisions, including certification and settlement approval.⁶ The provision for class members to object to proposed settlements is said to have given rise to the development of *professional objectors*, represented by counsel who allegedly attempt to leverage the potential to object to secure a fraction of any attorney fee award for themselves.

Early in the course of mass litigation, different plaintiffs may file individual claims or class action complaints in different federal or state courts. The result may be a sprawling litigation requiring multiple courts' resources and vastly increasing defendants' litigation expenses. To promote more-efficient case management and resolution, the federal multidistrict litigation (MDL) statute—28 U.S.C. § 1407 (Multidistrict Litigation)—authorizes a special panel of the federal judiciary appointed by the Chief Justice of the United States to centralize similar lawsuits filed in different federal courts (including putative class actions) in a single court and to appoint a single judge to coordinate *pretrial* proceedings regarding these cases. Plaintiffs or defendants may ask the panel to centralize the cases, or the panel may decide to do so *sua sponte*. In 2018, about half of all civil claims pending in federal courts were associated with MDL proceedings.⁷ Several states now also provide for such multidistrict coordination within their state court systems.

Judges assigned to MDL proceedings are barred from trying cases that originated in other districts; under the terms of the MDL statute, after pretrial motion and discovery are complete, cases are supposed to be remanded to the courts in which they were first filed. But, in practice, most claims that become part of an MDL proceeding are resolved in the MDL court, by dismissal, withdrawal, or settlement. The federal MDL statute does not encompass cases filed in state court. However, the federal MDL judge may certify a class action that comprises all claims, federal and state, and many MDL judges invite coordination with state court proceedings.

Canada

Class actions were first introduced in Canada in 1978, when the province of Quebec (a mixed common law and civil law jurisdiction) amended its Code of Civil Procedure to allow for representative claims.⁸ It took the enactment of the Class Proceedings Act, 1992, in Ontario,

⁶ For an accessible presentation of the complex law of American class actions, see Robert Klonoff, *Class Actions and Other Multi-Party Litigation in a Nutshell*, St. Paul, Minn.: West Academic Publishing, 2017.

⁷ Duke Law Center for Judicial Studies, *Guidelines and Best Practices for Large and Mass-Tort MDLs*, 2nd ed., Durham, N.C., September 2018. About 15 percent of all MDLs pending from 2005 to 2012 were associated with one or more class actions. Jonah Gelbach and Deborah Hensler, “Beyond Alternative Facts: Preliminary Descriptive Analysis of Federal Putative Class Actions, 2005–2012,” *Fordham Law Conference*, Vol. 87, No. 1, February 2018.

⁸ Code of Civil Procedure, RSQ c C-25.01, Book VI, art. 571–604.

however, for class actions to take root in the rest of Canada.⁹ To date, all but one of the remaining eight provinces has passed class action legislation, as has the Federal Court, which has subject-matter jurisdiction over matters within the powers of the federal government.

As is true with regard to the U.S. federal Rule 23, which inspired the Canadian regime, class actions must be certified by a judge according to a set of criteria that focuses on the commonality of legal and factual issues among class members, the suitability of the proposed representative, and the manageability of the action, including by comparison to alternatives.¹⁰ The certification tests in each Canadian province vary somewhat one from the other but are universally considered to be less onerous than current judicial approaches in the United States to Rule 23 certification.¹¹ Canadian class actions are transsubstantive, opt-out, and subject to close judicial supervision. They allow representative plaintiffs to sue for damages on behalf of the class, in addition to nonmonetary relief, but unlike U.S. Rule 23(b)(3), there is no special treatment for *damages* class actions. As in the United States, Canadian courts acknowledge that class members are largely absent in representative proceedings but permit class members to participate by objecting to proposed settlements. There is no culture of *professional* objectors or of a specialized bar to represent objecting class members, as there is said to be in the United States.

The financing of class actions in Canada is a unique mix of lawyers working on contingency fees, commercial litigation funding, and, in the two most active Canadian jurisdictions, not-for-profit litigation funding.¹² In recent years, commercial litigation funding has become more common, although still not nearly as popular as it is in Australia.¹³ Half of the Canadian provinces have cost-shifting rules for class actions, as is universally the case in all

⁹ Class Proceedings Act, 1992, SO 1992, c-6.

¹⁰ Class Proceedings Act, 1992, s. 5(1).

¹¹ Amendments to Ontario’s statute that were adopted in 2020, however, incorporate the predominance test verbatim from federal Rule 23 and are expected to make certification of class actions in that province more difficult than in the rest of the country. Statutes of Ontario, Bill 161, Smarter and Stronger Justice Act, Chapter 11, 2020.

¹² The Class Proceedings Fund in Ontario was created by statute at the same time that class proceedings legislation was passed. A five-member committee selected by the attorney general and Law Foundation of Ontario is required pursuant to Section 5 of Ontario Regulation 771/92 to consider applications to the fund and make a determination whether to fund a class action on the basis of three primary considerations: the extent to which the issues in the proceeding affect the public interest, the likelihood that the action will be certified, and the financial status of the fund. In return for funding disbursements and an indemnity against adverse costs awards, the fund receives a 10 percent levy on successful applicants’ settlement or judgment awards. For a description of the comparable Quebec fund, Le fonds d’aide aux actions collectives, see Justice Québec, “Fonds d’aide aux actions collectives,” homepage, undated.

¹³ For a comparative discussion of litigation funding of class actions in Canada and Australia, see Jasminka Kalajdzic, Peter Cashman, and Alana Longmoore, “Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding,” *American Journal of Comparative Law*, Vol. 61, No. 2, 2013.

other civil litigation in Canada, while the other half uniquely employ the American cost rule in class actions only. The question of costs has become controversial, especially in Ontario, where adverse costs awards in the hundreds of thousands of dollars have become the norm in certification motions.¹⁴

Canada does not have a procedure akin to the U.S. MDL proceeding; if multiple class action complaints are filed arising out of the same matter, counsel may move the court to appoint a single firm to *carry* (i.e., lead) the litigation. Nationwide classes may be certified in a single class action in one province, or several class actions proposing to represent only the residents of their respective provinces can proceed in parallel, with or without cooperation among counsel.

Australia

Statutory class actions were first introduced in Australia on March 4, 1992, in the Federal Court as a result of Part IVA of the Federal Court of Australia Act 1976 (Cth) coming into operation.¹⁵ Statutory class action procedures are now available in the Federal Court of Australia and in the supreme courts of four states: Victoria, New South Wales, Queensland, and Tasmania.¹⁶

The statutory regimes in each Australian jurisdiction are similar. The threshold criteria for the commencement of a class action are minimal: seven or more persons, with claims against the same person, arising out of the same similar or related facts giving rise to a substantial common question of law or fact. There is no certification requirement: A class action can be commenced if these minimal criteria are satisfied, without judicial approval being required. However, a defendant who objects to proceeding on a class basis may contend that the action should not be permitted to proceed as a class action, including on the basis that the class requirements are not satisfied. Other statutory provisions permit the court to consider whether the case can proceed as a class. Such challenges, although not common, do occur and sometimes succeed. As in the United States, the class action regime is transsubstantive, and

¹⁴ The Law Commission of Ontario concluded a two-year study of class actions in July 2019 and recommended that the province adopt a no-cost rule for the certification motion, on the basis that the risk of adverse costs had become a barrier to justice for public-interest litigants. Law Commission of Ontario, *Class Actions: Objectives, Experiences and Reforms; Final Report*, Toronto, July 2019. The attorney general of Ontario did not accept this recommendation, and no changes to the cost rule were included in Bill 161; see Statutes of Ontario, Bill 161, Smarter and Stronger Justice Act, Chapter 11, 2020.

¹⁵ Information on class actions in the Federal Court of Australia is in Federal Court of Australia, “Current Class Actions,” webpage, updated March 31, 2021. Reported and unreported Australian cases, from all state and federal jurisdictions, together with legislation, can be found on the database of the Australasian Legal Information Institute; see Australasian Legal Information Institute, homepage, last updated April 21, 2021. Another legal database with Australian cases and legislation can be found at Jade, homepage, undated.

¹⁶ The Western Australian and Tasmanian reforms to introduce class actions in the supreme courts in those jurisdictions have only recently been introduced.

classes are “opt-out”: Any person who fits the definition of the class is automatically a class member unless they formally exclude themselves.

Financing class actions presented an early stumbling block for implementation of the federal class action regime (which was adopted prior to the passage of similar state legislation). Lawyers are prohibited from charging percentage contingency fees in Australia, although they may offer to work on a “no win, no pay” basis. In the Australian regime, it is the lead applicant (i.e., the class representative) who retains the lawyer. Normally, legal fees are calculated based on hourly rates. If the case is conducted on a “no win, no pay” basis, a further *uplift* (up to a maximum of 25 percent of the hourly rate) is payable in the event of success in the litigation. Although the courts have general discretion in relation to the making of orders for costs, at the conclusion of the proceedings, the successful party will usually obtain an order from the court that the losing party must pay (most of) the legal costs incurred in conducting the litigation. The lead applicant is personally liable for any adverse costs order or requirement to provide security for costs,¹⁷ whereas the class members are not liable for adverse costs or security for costs.¹⁸ This allocation of costs and risks, which enables all other class members to “free ride” on the lead applicant’s willingness to invest in the proceedings and assume the cost risk, is not likely to encourage individuals to come forward as lead applicants. The effect of these factors taken together was to sharply curtail the number of class actions filed in the early years of the regime. During the initial period, labor unions were responsible for a significant fraction of class actions, as they had the wherewithal to pay lawyers to maintain the litigation, as well as to assume adverse cost risks.

After some time, commercial litigation funders came forward to fill the funding gap. Unlike the lawyers, funders were able to enter into agreements with individual class members to take a percentage of the amount recovered by class members if the claim was successful. In return, they would pay a share of the ongoing legal expenses, assume the adverse cost risk, and provide any amount required to be paid or guaranteed by way of security for the defendant’s costs.

This initial solution arrived at—ultimately with the approval of the High Court of Australia—which permitted funders to contract with individual class members, had the effect of turning the formal opt-out regime into an informal opt-in regime—producing what came to be known as *closed* classes. Not surprisingly, although this enabled the statutory regime to become effective, the development evoked controversy. In some instances, classes

¹⁷ Usually, in a funded case, the commercial litigation funder will indemnify the lead applicant in respect of any order for costs or security for costs. Often there will also be an after-the-event insurance policy taken out with a commercial insurer, whereby the insurer assumes liability to pay any such costs in consideration for the payment of a (substantial) premium. Often, the premium is as high as one-third of the limit of indemnity required. Usually, the majority of the premium amount is payable only upon a successful outcome.

¹⁸ In some limited circumstances, a class member may become liable for certain costs—e.g., if they become appointed as a subgroup representative or if they take steps in the litigation in connection with the resolution of individual issues in respect of their particular claim.

were defined to comprise both individually funded and nonfunded class members. This in turn raised policy concerns, as the unfunded class members stood to obtain larger damages if the class prevailed, as, unlike funded members, the unfunded class members owed nothing to the commercial litigation companies.

Lawyers worked together with judges to seek to achieve equity in such circumstances. One innovation was to make *funding equalization* orders, whereby the same percentage amount payable by funded class members to the funder was deducted from the amount payable to nonfunded class members, but rather than this being paid to the funder, it was put back into the pot for distribution to all class members. But pressure to come up with a solution arguably more in keeping with the goals of the original statutory regime led to continuing procedural innovation. In 2016, the Full Court of the Federal Court of Australia upheld the authority of judges to make so-called common fund orders modeled along the lines of U.S. class action practice.¹⁹ Such orders entitle the litigation funder to recover a percentage from the class as a whole, if the case is successful, without individual contractual arrangements being entered into. Although these orders are often made early or in the course of the litigation, the court ultimately determines the reasonableness of the amount payable to the litigation funder at the conclusion of the proceedings. In April 2019 both the Federal Court and the New South Wales (NSW) Court of Appeal held that Australian federal and state courts had the power to make such common fund orders in class action litigation; however, several months later, in December 2019, the High Court of Australia decided (by majority) to the contrary.²⁰ At the time of writing, it remains a vexed question as to whether such an order can be made at the conclusion of the proceedings following a settlement or judgment. There have been several recent conflicting first instance decisions in the Federal Court.

A further vexed question is whether courts are empowered to make orders limiting the benefits of an open class action to those class members who take affirmative steps to participate (so-called class closure orders). The NSW Court of Appeal in April 2020 determined that there was no power to do so in the factual circumstances of that case.²¹

With controversy over funding of class actions and other aspects of class action practice ongoing, in 2017 the Australian Law Reform Commission was asked to undertake a study of class actions. In its report, tabled in Parliament in early 2019, the commission recommended *inter alia* that percentage-based fees should be permitted in class actions subject to a

¹⁹ *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* [2016] FCAFC 148 (Murphy, Gleeson and Beach JJ). All federal common fund orders made up to the end of 2018 are summarized in the empirical report; see Vince Morabito, “An Evidence-Based Approach to Class Action Reform in Australia: Common Fund Orders, Funding Fees and Reimbursement Payments,” SSRN, February 11, 2019.

²⁰ The NSW Court of Appeal decision is *Brewster v. BMW Australia Ltd* [2019] NSWCA 35. The Full Federal Court of Australia decision is *Lenthall v Westpac Life Insurance Services Ltd* [2019] FCAFC 34. The High Court decisions are *BMW Australia Ltd v Brewster* and *Westpac Banking Corporation v. Lenthall* [2019] HCA 45 (December 4, 2019).

²¹ *Haselhurst v Toyota Motor Corporation Australia Ltd t/as Toyota Australia* [and other proceedings] [2020] NSWCA 66.

number of specified conditions.²² Similar proposals were made by the Victorian Law Reform Commission.²³ Legislative reform proposals to allow lawyers to act in class actions on the basis of a percentage fee have recently been passed by the Parliament in Victoria.

Despite the absence of federal government action on the Law Reform Commission report and recommendations, in May 2020 the Australian government announced a new inquiry into class action practice focusing on litigation funding. The government contended that rising numbers of class actions were imposing unacceptable costs on industry and suggested that the COVID-19 pandemic’s effect on business justified new restrictions on litigation funding. Opposition party leaders decried the moves as pandering to industry and ignoring the needs of consumers.²⁴ The inquiry was conducted by the Parliamentary Joint Committee on Corporations and Financial Services, which reported on December 7, 2020. There were more than 100 submissions to the inquiry, including from the U.S. Chamber of Commerce, all of which are available online.²⁵ On May 22, 2020, the Commonwealth treasurer announced that the Australian government would introduce regulations that would require third-party litigation funders to obtain an Australian Financial Services License and treat funded class actions as managed investment schemes. This has now occurred.

A significant amount of empirical data is available in respect to the operation of the Australian class action regimes. This has been compiled and analyzed principally by Professor Vince Morabito of Monash University in Melbourne.²⁶ From 1992 to 2018, more than 600 class actions were commenced, approximately three-quarters of which were in the Federal Court. There is an increasing proportion of claims in respect to financial products and securities (about 50 percent). This reflects the increasing proportion of funded cases. Around 70 percent of class actions commenced in recent years were funded by a commercial funder.

In its recent submission to the Parliamentary Inquiry, the Law Council of Australia provided empirical data on class action settlements in the period 2001–2020. Of the class actions identified, costs and out-of-pocket expenses paid to lawyers have averaged approximately 15 percent of the settlement amount, while commissions charged by third-party funders

²² On January 24, 2019, the attorney general for Australia tabled the report in Parliament; see Australian Law Reform Commission, *Integrity, Fairness and Efficiency—an Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Brisbane, 2018. The Australian Law Reform Commission made 24 recommendations for reform of class action practice and procedure. Professors Deborah Hensler and Jasminka Kalajdzic served on the academic advisory panel to the Australian Law Reform Commission inquiry.

²³ Victorian Law Reform Commission, *Access to Justice—Litigation Funding and Group Proceedings*, Melbourne, Australia: Victorian Government Printer, 2018. The commission made 31 recommendations for reform.

²⁴ Nick Bonyhady, “Government Pushes Ahead with Class Action Inquiry,” *Sydney Morning Herald*, May 13, 2020.

²⁵ Parliament of Australia, “Litigation Funding and the Regulation of the Class Action Industry,” undated.

²⁶ See, e.g., Vince Morabito, “An Evidence-Based Approach to Class Action Reform in Australia: Competing Class Actions and Comparative Perspectives on the Volume of Class Action Litigation in Australia,” SSRN, July 11, 2018.

have averaged approximately 27 percent. Thus, class members received, on average, less than 60 percent of the settlement amount.

In research papers recently published online, further detailed empirical data and information are available about the operation of the Australian class action regime.²⁷

Germany

Germany does not have a general class action mechanism but has three other forms of collective and aggregate litigation procedures. These are actions by associations for injunctions; the Kapitalanleger-Musterverfahrensgesetz (KapMuG; Capital Market Investors' Model Proceedings Act), designed for capital market claims; and the Musterfeststellungsklage (Model Declaratory Action), a new model declaratory action designed for consumer claims. Associations' actions are the oldest of these, dating back to the late 19th century. They give special standing for certain associations and institutions to seek injunctions against unlawful corporate behavior, mainly in the fields of unfair competition, unfair contract terms, and consumer protection law. These actions have proven to be quite successful in stopping certain illegal practices. However, as these associations are nonprofit entities, their capacity to bring such claims is rather limited. Furthermore, damage actions are not possible under these rules, so compensation for affected individuals cannot be achieved, and any resulting deterrence effect is unlikely.

The KapMuG was enacted in 2005 and is used to bundle individual actions that are already pending before the court. From these individual actions, common issues are extracted and resolved in model proceedings before a higher court. Subsequently, the individual proceedings are continued on the basis of these common findings. The KapMuG procedure is limited to the field of prospectus liability and other claims based on alleged violations of capital market information duties.

In 2018, partly in response to the VW litigation, the Musterfeststellungsklage was created for consumer claims only. It provides standing for certain associations seeking a declaratory judgment on certain common issues that are relevant for multiple consumer claims. It is an

²⁷ Peter Kenneth Cashman and Amelia Simpson, "Research Papers #1 and #2—Class Actions and Litigation Funding Reform: The Rhetoric and the Reality," University of New South Wales Law, December 1, 2020b; Peter Kenneth Cashman and Amelia Simpson, "Research Paper #3—Class Actions and Litigation Funding Reform: The Views of Class Action Practitioners," University of New South Wales Law, December 4, 2020d; Peter Kenneth Cashman and Amelia Simpson, "Research Paper #4—The Problems of Delay in Class Actions," University of New South Wales Law, December 11, 2020e; Peter Kenneth Cashman and Amelia Simpson, "Research Paper #5—Costs and Funding Commissions in Class Actions," University of New South Wales Law, December 11, 2020f; Peter Kenneth Cashman and Amelia Simpson, "Research Paper #6—Class Action Remedies: Cy-près; 'An Imperfect Solution to an Impossible Problem,'" University of New South Wales Law, November 19, 2020a; Peter Kenneth Cashman and Amelia Simpson, "Research Paper #7—Class Actions: Commercial Funding, Regulation and Conflicts of Interest," University of New South Wales Law, 2020c.

opt-in procedure in the sense that affected consumers may register to participate in these procedures, and, if they do, the result is legally binding on them with respect to their individual claims. However, the *Musterfeststellungsklage* is limited to declaratory judgments, so individual consumers still must bring individual actions later if the defendant does not voluntarily compensate them.

German lawyers are normally not permitted to charge contingency fees but rather contract with clients to be paid fees fixed by statute or on an hourly fee and expense basis. The contracts may include provisions for *success fees*, but these may not be calculated as a share of an award. As in most jurisdictions other than the United States, losing parties are subject to adverse cost orders. Legal expense insurance is widely available in Germany and has played a role in some large-scale litigation, including some aspects of the VW litigation. Third-party funding is permissible in Germany but somewhat frowned upon.

The Netherlands

The Netherlands was one of the first European countries to introduce a collective action mechanism. In April 1994, the Dutch Civil Code was amended to give standing to non-profit organizations to bring collective actions. These are not damage actions but rather lawsuits seeking declaratory or injunctive relief only. There is no certification requirement, and the lead plaintiff can be an established foundation or an association (such as the Dutch Shareholders’ Association), or it can be a special-purpose vehicle incorporated for the purpose of the specific litigation. A successful collective action then enables individual litigants to sue for damages on the basis of the declaratory order, or, more likely, the defendants seek to resolve the dispute through settlement.²⁸

In 2005, a second mechanism was introduced to facilitate settlements of mass disputes. The Dutch Act on Collective Settlements (*Wet Collectieve Afwikkeling Massachade*; WCAM) was inspired by the U.S. settlement class action, a procedure not recognized formally in Rule 23 but widely perceived to be the most common form of U.S. damage class action today.²⁹ WCAM is the only mechanism in Europe that allows for a settlement that binds an entire class on an opt-out basis. Like the Dutch collective action, WCAM is transsubstantive and permits only certain nonprofit organizations or special-purpose foundations to represent the group members. Claimants and defendants petition the Amsterdam Court of Appeal to approve the settlement agreement. Individual claimants receive notice of the hearing on the

²⁸ For a description and discussion of the collective settlement and collective action regimes, see Ianika Tzankova and Daan Lunsingh Scheurleer, “The Netherlands,” *Annals of the American Academy of Political and Social Science*, Vol. 622, No. 1, March 2009, p. 149.

²⁹ Ianika Tzankova, “Funding of Mass Disputes: Lessons from the Netherlands,” *George Mason Journal of Law, Economics and Policy*, Vol. 8, 2012.

fairness of the proposed settlement and have the right to object. If the court grants the request to certify the settlement, claimants have the right to opt out.

A new collective action regime (Dutch Wet Afwikkeling Massaschade in Collectieve Actie [An Act for Handling Mass Claims in Collective Actions, WAMCA]) came into force in the Netherlands on January 1, 2020. The new legislation is applicable to collective actions filed after that date in relation to wrongdoing that took place either after November 15, 2016 (the date that the new law was submitted to Parliament), or before that date but continued afterward, as would typically be the case in competition litigation or securities litigation that usually span a longer time period. Under the new legislation, damages can be claimed in collective actions, and domestic parallel or overlapping actions for the same facts will no longer be possible. An exclusive representative will be appointed in the event that there are multiple candidates for the position. Standing is still limited to nonprofit entities, but when appointing the exclusive representative, the court will need to take a list of requirements into account with respect to the governance, representativeness, and financial status of the nonprofit entity to assess whether the interests of the group members are adequately protected. The expectation is that there will be a longer and more extensive certification stage in comparison to the old regime, because the court will need also to examine whether there is a sufficient connection with the Netherlands as part of the certification test.³⁰ After the appointment of the exclusive representative, which at the same time will mark the end of the debate on certification, there will be an opportunity for group members domiciled in the Netherlands to opt out³¹ and for other group members to opt in.³² After certification, there will be a court directed negotiation or mediation phase.³³ If that leads to a collective settlement, there will be a similar settlement approval procedure as under WCAM, with a second opt-out window.³⁴ If there is no settlement, parties will have the opportunity to amend their statements of claim and defense and, at the request of the court, to submit separate proposals for a damages distribution plan.³⁵ The court will rule on the basis of these proposals or at its own motion. By the end of 2020, 19 collective actions had been filed under the new regime.³⁶ The new legislation requires the claimants to register the collective action on a publicly accessible website.³⁷

³⁰ Art. 3:305a paragraph 3 onder b Dutch Civil Code.

³¹ Art. 1018f paragraph 1 Dutch Code of Civil Procedure.

³² Art. 1018f paragraph 5 Dutch Code of Civil Procedure.

³³ Art. 1018g Dutch Code of Civil Procedure.

³⁴ Art. 1018h Dutch Code of Civil Procedure.

³⁵ Art. 1018i Dutch Code of Civil Procedure.

³⁶ Bundesgerichtshof, 25 May 2020, VI ZR 252/19; personal report by Professor Ianika Tzankova.

³⁷ Art. 1018c paragraph 3 Dutch Code of Civil Procedure. Many other European jurisdictions have adopted mechanisms for group or collective actions over the past few decades. For a list of jurisdictions with collective litigation procedures as of 2017, see Hensler, 2017, Table 1.

As in most other civil law jurisdictions, losing parties in the Netherlands are subject to adverse cost orders. Associations and special-purpose foundations may retain lawyers on hours and expense contracts, and some public funds are available to support collective actions. However, in recent decades, third-party funding secured by special-purpose foundations has become the leading means of financing such actions, offering payment for lawyer fees and protection against the risk of adverse cost orders.

Brazil

Several Latin American jurisdictions have adopted collective litigation procedures over the past two decades, and Brazil has been generally regarded to be at the forefront, especially in the realm of consumer protection.³⁸ The current legal framework rests on two important statutes and a constitutional provision—enacted between 1985 and 1990—that permits the amalgamation of large numbers of small individual claims in a single litigation. Under the current law, claims arising from the same factual or legal situation affecting a group, class, or category of individuals can be easily aggregated.³⁹ The first act is the *Lei da Ação Civil Pública* (Public Civil Action Law) of 1985.⁴⁰ Its passage was followed by the inclusion of a special provision—Article 5—in the Constitution of 1988, which elevated consumer protection to a prominent place among individual and collective rights.⁴¹ Finally, in 1990 the National Congress of Brazil passed the *Código de Defesa do Consumidor* (Consumer Defense Code; CDC),⁴² which included both substantive and procedural provisions that further cemented the possibility of obtaining judicial redress for large-scale violations. Decades earlier, in 1965, a special statute called *Lei da Ação Popular* (LAP; Popular Action Statute) permitted citizens to obtain redress for acts attributed to public agencies and private corporations.⁴³ The main feature of LAP was to recognize standing to any individual acting on behalf of the general interest. Nevertheless, LAP fell short of allowing claim aggregation. Another predecessor of

³⁸ See Beatriz Londoño Toro and Laura Victoria García-Matamoros, “Análisis de las estadísticas sobre acciones populares y derechos colectivos,” *Tutela: Acciones populares y de cumplimiento*, Vol. 3, No. 29, May 2002; Ada Pellegrini Grinover, “Hacia un sistema Iberoamericano de tutela de intereses transindividuales,” in *La tutela de los derechos difusos, colectivos e individuales homogéneos*, Mexico City: Editorial Porrúa, Instituto Iberoamericano de Derecho Procesal, 2003; Ada Pellegrini Grinover, “Brazil,” *Annals of the American Academy of Political and Social Science*, Vol. 622, No. 1, 2009, p. 63.

³⁹ Lei No. 8.078, de 11 de Setembro de 1990, art. 81 (Braz.).

⁴⁰ Lei No. 7.347, de 24 de Julho de 1985 (Braz.).

⁴¹ Constituição Federal [C.F.] [Constitution], art. 5 (Braz.).

⁴² Lei No. 8.078, de 11 de Setembro de 1990 (Braz.).

⁴³ Lei No. 4.717, de 29 de Junio de 1965 (Braz.); see also Antonio Gidi, “Class Actions in Brazil—a Model for Civil Law Countries,” *American Journal of Comparative Law*, Vol. 51, No. 2, Spring 2003, pp. 311, 326; Keith S. Rosenn, “Civil Procedure in Brazil,” *American Journal of Comparative Law*, Vol. 34, 1986, pp. 487, 517.

the current system is the *actio popularis* created by the Constitution of 1934 as a mechanism to challenge statutory acts deemed to affect the public interest.⁴⁴

The CDC makes a distinction among diffuse, collective, and individual-homogeneous rights.⁴⁵ Diffuse rights usually refer to the preservation of a public good, such as environmental protection, as opposed to a private individual or a group interest.⁴⁶ Collective rights are also transindividual and indivisible but are generally linked to a group, category, or class determined by common elements of law or a preexisting legal relationship.⁴⁷ Individual-homogeneous rights, on the other hand, are subjective rights that have common origin or arise from the same factual situation. The common origin of these rights is precisely what justifies the aggregation of numerous claims into a single proceeding. Brazil does not have a class certification provision. Also, there is no minimum number of claimants needed for a collective action to proceed. The focus is rather on who has standing to sue on behalf of collective rights, according to the provisions of the Lei da Ação Civil Publica and the rules of the Code of Civil Procedure.

Despite the broad range of rights recognized by the CDC, standing is granted only to the Office of the Public Prosecutor (Ministério Público), states, municipalities, the Federal District, and specially authorized consumer associations that have been established for at least one year prior to the filing of the suit.⁴⁸ When consumer associations act as plaintiff, only those who have given consent to participate in the litigation may benefit from the outcome. In all other cases, anyone can benefit from a favorable judgment (*res judicata secundum eventum litis*) but are not affected by an adverse judgment. The participation of the public prosecutor in the proceedings is deemed so important that notification is always required regardless of whether the public prosecutor initiated the action or not.⁴⁹ Another important feature of the CDC regime is the possibility of allowing the plaintiff to pierce the corporate veil of several defendant entities and consolidate all claims into a single suit.⁵⁰

One of the most salient effects of the CDC collective action regime is the extension to the general population (*erga omnes*) or to any potential members of the group, class, or category of plaintiff (*ultra partes*),⁵¹ of the *res judicata* effects of the court's decision. Nevertheless, article 103 of the CDC also permits individual class members to pursue separate actions should

⁴⁴ Constituição da República dos Estados Unidos do Brasil, de 16 de Julho de 1934 (Braz.).

⁴⁵ Lei No. 8.078, de 11 de Setembro de 1990, art. 81 (Braz.).

⁴⁶ See Gidi, 2003, pp. 350, 355.

⁴⁷ Gidi, 2003, p. 356.

⁴⁸ Lei No. 8.078, de 11 de Setembro de 1990, art. 82(B) (Braz.).

⁴⁹ Lei No. 8.078, de 11 de Setembro de 1990, art. 92 (Braz.).

⁵⁰ Lei No. 8.078, de 11 de Setembro de 1990, art. 28 (Braz.).

⁵¹ Lei No. 8.078, de 11 de Setembro de 1990, art. 103 (Braz.).

the collective proceedings prove unsuccessful.⁵² The CDC contains some key pro-plaintiff features, such as the shifting of the burden of proof to the defendant, a strict liability rule that relieves the plaintiff from having to establish the defendant’s culpability,⁵³ and the exemption of court fees and other related expenses to plaintiffs.⁵⁴ Public officials rely on public funds to support litigation, while associations rely on member contributions. Unlike common law jurisdictions, which allow punitive damages as a deterrent, Brazil does not permit that possibility. Nevertheless, at least in the context of collective litigation, it has become increasingly common for Brazilian judges to award moral damages in lieu of punitive damages.⁵⁵

Chile

The pillar of Chile’s collective litigation regime is the Consumer Protection Act (CPA) of 2004.⁵⁶ The statute allows the filing of three types of actions: (1) an action filed on behalf of an identifiable group of consumers linked to a single defendant by a contract,⁵⁷ (2) an action for the defense of diffuse interests (unidentifiable groups of consumers) and (3) an individual consumer protection action.⁵⁸ Standing to bring both collective and diffuse interest actions is restricted to a public agency named the National Consumer Service (Servicio Nacional del Consumidor; SERNAC),⁵⁹ consumer associations, or a group of 50 individuals whose claims arise from common issues of fact and law.⁶⁰ SERNAC is a public agency ascribed to the Ministry of Economy, Growth and Reconstruction.⁶¹ SERNAC’s functions include the implementation of consumer protection policies, public campaigns, and the oversight of activities of other consumer advocacy organizations. As a precondition for filing a class action, consumer associations have to be incorporated at least six months prior to filing the complaint

⁵² Lei No. 8.078, de 11 de Setembro de 1990, art. 103 (Braz.); see also Gidi, 2003, p. 389.

⁵³ See CDC at art. 12 (“National or foreign manufacturers, producers, constructors, and importers are liable, regardless of the existence of culpability, for the redress of damages caused to consumers by defects from design, manufacture, construction, assembly, formulation, handling, presentation or packaging of products, as well as for the improper or incomplete information about their use and risks” [translation by Manuel A. Gómez]).

⁵⁴ CDC at art. 87.

⁵⁵ CDC at art. 87.

⁵⁶ Law No. 19955, Julio 2, 2004, *Diário Oficial [D.O.]* (Chile) [hereinafter “CPA”].

⁵⁷ See CPA at art. 50.

⁵⁸ See CPA at art. 50.

⁵⁹ See CPA at art. 51(1)(a).

⁶⁰ See CPA at art. 51(1)(c).

⁶¹ See CPA at art. 57.

and obtain express authorization from their members.⁶² The rationale for these requirements is to disincentivize “opportunistic lawyers with little or no long-term commitment to the protection of consumer rights, but rather driven by the prospect of an early settlement that brings a large fee award.”⁶³

The CPA vests Chilean judges with certain powers not commonly seen in ordinary litigation in Chile. For example, the judge may appoint lead counsel and set the counsel’s fees according to the amount in dispute and the financial ability of the parties.⁶⁴ Another power is the ability to sanction counsel when a claim is deemed frivolous.⁶⁵ Upon the filing of a class action complaint, the trial judge is required to examine whether the four prerequisites set forth in article 52 of the CPA are met: (1) whether the plaintiff has standing, (2) whether the alleged harm affects the diffuse or collective interest of a class, (3) whether the complaint includes the factual circumstances that affect the entire class or group, and (4) whether the potential number of class members is so numerous that—in terms of a cost-benefit analysis—a class action proceeding is justified.⁶⁶ To make a determination, the judge has to take into account any evidence submitted by the defendant to counter the plaintiff’s request for certification.⁶⁷

Immediately after certification is granted, the CPA requires the issuance of a public notice,⁶⁸ so any potentially affected individual may join the litigation.⁶⁹ The public notice also sets the beginning of a thirty-day opt-out period for those who want to be expressly excluded from the general effects of any potential decision on the merits.⁷⁰ Once the opt-out period has lapsed, any outcome—either via judgment or settlement—will have *res judicata* effects not only for the parties but *erga omnes*.⁷¹ Other managerial powers given to Chilean judges in handling consumer class actions are the possibility of creating subclasses,⁷² the active encouragement of settlement throughout the proceedings,⁷³ and the proposal and implementation of a system establishing the payment and disbursement of award monies among individual

⁶² See CPA at arts. 5–9.

⁶³ Manuel Gómez, “Will the Birds Stay South? The Rise of Class Actions and Other Forms of Group Litigation Across Latin America,” *Miami International American Law Review*, Vol. 43, No. 2, 2012.

⁶⁴ CPA at art. 51(7).

⁶⁵ CPA at art. 50 E.

⁶⁶ See CPA at art. 52.

⁶⁷ CPA at art. 52.

⁶⁸ All public notices shall contain the specific requirements set forth in CPA article 54 A. See CPA art. 54 A.

⁶⁹ CPA at art. 53.

⁷⁰ CPA at art. 53(f).

⁷¹ CPA at art. 54 C.

⁷² CPA at art. 53 A.

⁷³ CPA at art. 53 B.

plaintiffs.⁷⁴ Government officials rely on public funds to support their actions, but private parties may contract with lawyers to represent them on a contingency-fee basis.

Summary of Procedural Variation Across the Seven Jurisdictions

As described above, procedures for aggregating claims and for representative collective actions vary significantly across jurisdictions. Depending on certain key features, a procedure will be more or less likely to be used by claimants. Most obviously, transsubstantive procedures may be used in a wider variety of factual circumstances than procedures specified for use only for some types of claims. Strict certification procedures will likely restrict use of procedures, while an absence of certification encourages use. Reserving standing to government agencies or preapproved associations gives the government more control over the use of procedures than according standing to individual class members of ad hoc associations. Requiring class members to opt in or register for an aggregate or model case proceeding is likely to lead to smaller numbers of claimants submitting claims, in comparison to so-called opt-out procedures that deem all claimants who meet eligibility criteria as class members unless they proactively exclude themselves. Finally, cost-shifting rules that require class representatives to bear adverse cost risk and perhaps post bonds decrease the likelihood that individuals and nonprofit organizations will come forward to lead litigation, and ethical rules that forbid lawyers to charge contingency fees lower the probability of large-scale litigation, while legal expense insurance and permission for third-party funding push in the other direction. Table 3.1 summarizes these features by jurisdiction.

⁷⁴ CPA at art. 54 F.

TABLE 3.1
Overview of Aggregate and Representative Procedures in Seven Jurisdictions

| Jurisdiction | Scope | Aggregate or Representative | Certification or Court Order? | Standing | Opt-Out or Opt-In | Remedies Available | Cost Shifting? | Financing |
|--------------------------------------|------------------|------------------------------|--------------------------------|---|--|----------------------------|------------------------------|--|
| U.S. class action | Transsubstantive | Representative | Yes | Representative class member | Opt-out | All legal, including money | No | Judge awards fees if class prevails |
| U.S. MDL | Transsubstantive | Aggregate | Yes | Individual plaintiffs | Previously filed claims are coordinated | All legal, including money | No | Contingent fee contracts |
| Canada class action | Transsubstantive | Representative | Yes | Representative class member | Opt-out | All legal, including money | Yes, but only in 5 provinces | Contingent fee contracts and third-party funding with judicial oversight, two public funds |
| Australia class action | Transsubstantive | Representative | No | Representative class member | Opt-out | All legal, including money | Yes | “No win, no pay,” third-party funding with judicial oversight, contingent fees (Victoria) |
| Germany KapMuG | Shareholder | Aggregate (model proceeding) | Yes (court selects model case) | Individual plaintiffs | Individual claims all bound by model case decision | Declaratory | Yes | Legal expense insurance, contractual hourly fees, third-party funding |
| Germany Consumer | Consumer | Representative | Yes | Existing approved association | Opt-in | Declaratory | Yes | Association contracts with lawyers on hourly basis or fixed fee |
| Netherlands collective action (2020) | Transsubstantive | Representative | Yes | Existing approved association and ad hoc foundation | Opt-out plus opt-in | All legal, including money | Yes | Third-party funding, legal expense insurance; contractual hourly fees |

Table 3.1—Continued

| Jurisdiction | Scope | Aggregate or Representative | Certification or Court Order? | Standing | Opt-Out or Opt-In | Remedies Available | Cost Shifting? | Financing |
|-----------------------------------|--|-----------------------------|-------------------------------|---|---|----------------------------|--|---|
| Netherlands collective settlement | Transsubstantive | Representative | No | Existing approved association and ad hoc foundation | Opt-out plus opt-in | Money | Yes | Third-party funding, defendants, public funds, insurers |
| Brazil collective litigation | Diffuse, collective, and individual homogeneous rights | Representative | No | Public officials and existing approved associations | No opt-out or opt-in rights for diffuse or collective rights; in actions for homogeneous rights, <i>res judicata</i> applies to nonparties who fit the class definition | Declaratory plus money | Claimant is exempted from paying court, expert, and legal fees, except in cases of bad faith | Public officials rely on public funds, and consumer associations rely on member contributions |
| Chile consumer protection | Consumer | Representative | Yes | Government agency and representative class member | Opt-in and opt-out | All legal, including money | Yes | Public funds and contingent fee contracts |

Overview of the Volkswagen Litigation: The United States, Canada, Australia, Germany, the Netherlands, Brazil, and Chile

The litigation against VW arising out of the “clean diesel” emissions scandal began in the United States but soon spread through North and South America, Europe, and Asia.¹ The law faculty who organized the roundtable were closely monitoring the progress of the litigation in the United States, Canada, Australia, Germany, the Netherlands, Brazil, and Chile.² At the time of the roundtable in April 2019, most of this litigation was still ongoing, although the shape of the outcomes in the United States and Canada had become quite clear. The Australian litigation was still being fiercely contested by VW, and although securities litigation was well under way in Germany using the KapMuG procedure, it was not clear whether the new model declaratory action for consumer claims would substantially benefit VW purchasers there. Litigation in the Netherlands and other European jurisdictions was still in a nascent stage but had progressed further in Brazil and Chile. Developments in the litigation provided the background for the roundtable discussion. With the passage of time, the roundtable organizers were able to update the status of the litigation through about June 2020, as reported in this chapter.

¹ The coauthors gratefully acknowledge the information provided by lawyers representing plaintiffs and defendants about the status of VW civil and criminal proceedings in their jurisdictions up to and subsequent to the roundtable. Deborah Hensler thanks David Nachman, senior enforcement counsel for the New York State Office of the Attorney General, for the description of the role of state attorneys general in the litigation and Robert Peck, president of the Center for Constitutional Litigation, for pointing to the state court litigation that proceeded in parallel with the federal MDL, described in this chapter.

In addition to Germany and the Netherlands, other European jurisdictions that have experienced VW litigation are Austria, Belgium, France, and Italy; litigation has also begun in the United Kingdom and Ireland and in some East Asian countries. On European litigation, see footnote 94, later in this chapter. On Asia, see Jennifer Collins, “Volkswagen Crisis Spreads to Asia,” DW.com, September 22, 2015. As should be obvious, litigation has arisen only where VW or its subsidiaries marketed the “clean diesel” vehicles.

² The discussion in this chapter of the progress of the litigation in Brazil and Chile was contributed by Professor Manuel Gómez, who was present at the roundtable and has been following that litigation and the development of collective proceedings throughout Latin America for many years.

The United States

Although the VW litigation began in the United States, it had a global dimension from its inception. The story began with an investigation of on-road NO_x (nitrogen oxide) emissions of vehicles that had been certified by regulators in the United States and Europe, commissioned in 2012 by the International Council on Clean Transportation (ICCT) and carried out by the West Virginia University Center for Alternative Fuels Engines and Emissions (CAFEE).³ The ICCT is an international nongovernmental organization, headquartered in Washington, D.C., with offices in Asia, Europe, and Latin America, as well as other parts of the United States. Its mission is to provide unbiased research and analysis to environmental regulators.⁴ CAFEE is located on West Virginia University’s campus in Morgantown, West Virginia. The research team that won the contract from the ICCT comprised two student engineers from India and one from Switzerland. Operating with a lean budget from the ICCT, the students rented three “clean diesel” vehicles manufactured by VW from two rental agencies and a private owner and tested them on California highways. To their puzzlement, the results showed that, in contrast with the vehicles’ performance under official emission testing, in on-the-road testing, the automobiles’ emissions were many times greater than permitted under California’s tough pollution-control standards.

In March 2014, the research team presented its findings at a conference in Southern California. In the audience were automobile and oil industry representatives and regulators, including the deputy head of the California Air Resources Board (CARB), the leading state environmental regulatory agency. CARB’s subsequent investigations following up on the ICCT-CAFEE project soon drew in federal regulators from the U.S. Environmental Protection Agency (EPA). After months of discussions in which the regulators pressed VW without success to explain the discrepancy between official testing and on-the-road performance, on September 18, 2015, the company publicly admitted that its engineers had deliberately installed a device in the vehicles’ software to “defeat” the emission testing equipment. A few days later, VW’s CEO, Martin Winterkorn, resigned,⁵ and the company quickly hired Kirkland & Ellis, a leading U.S.-based corporate law firm (which had previously handled the Gulf of Mexico oil spill disaster for BP) to manage the tsunami of private litigation and governmental actions that it expected would undoubtedly follow.⁶ Soon after, the company also hired Kenneth Feinberg, renowned for his design and administration of the U.S. September

³ Philipp Oehmke, “Out of Nowhere: The Three Students Who Discovered Dieseldgate,” *Der Spiegel*, October 23, 2017.

⁴ International Council on Clean Transportation, “Mission/History,” webpage, undated.

⁵ Sean Farrell and Graham Ruddick, “Volkswagen CEO Martin Winterkorn Quits over Diesel Emissions Scandal,” *The Guardian*, September 23, 2015.

⁶ Farrell and Ruddick, 2015.

11th Victim Compensation Fund and other mass claim compensation facilities, to advise on addressing potential VW consumer claims.⁷

Almost immediately, Hagens Berman, a long-established law firm headquartered in Seattle, Washington, that specializes in consumer class actions and has extensive experience litigating against the automotive industry, filed a class action against VW of America for consumer fraud and other violations. Within three days the firm had filed lawsuits in 20 states and announced that its objective was to bring suit in every state in the United States. The firm announced that after publishing a press release regarding its first suit, it was being deluged with contacts from angry consumers. According to the firm, many owners said that they had purposefully bought VW's "clean diesel" cars—paying a several-thousand-dollar premium in comparison to other automobile manufacturers' models—in the belief that they were protecting the environment while at the same time achieving superior fuel efficiency.⁸

Meanwhile, on the public enforcement front, within days of the EPA and CARB issuing notices of violation to VW for the use of defeat devices in hundreds of thousands of VW diesel engine vehicles, environmental and consumer fraud attorneys from the offices of dozens of state attorneys general were participating in large conference calls, discussing working together to investigate VW's apparent violation of their states' emissions and anti-tampering laws, as well as Unfair and Deceptive Acts and Practices (UDAP) and other consumer protection statutes.⁹ Among the early leaders of that multistate investigation was the New York State Office of the Attorney General, which publicly announced its investigation and the collaborative effort with other state attorneys general on September 22, 2015.¹⁰

The multistate investigation involved weekly calls among a smaller group of six Executive Committee states (New York, Massachusetts, Connecticut, Washington, Oregon, and Tennessee) and an additional weekly or biweekly call among a larger group of more than 40 jurisdictions. The Executive Committee applied for and obtained a \$1.5 million grant from the National Association of Attorneys General for purposes of paying experts and other litigation expenses. The multistate group also served dozens of subpoenas and civil investigative demands on Volkswagen, Porsche, and VW's German software contractor, Bosch. The pre-suit investigatory powers that most attorneys general possess allow them to seek documents from targets and take testimony of key witnesses without subjecting themselves to opposing discovery or to the immediate jurisdiction of a court and its oversight.

⁷ Danielle Ivory, "VW Names Kenneth Feinberg to Oversee Fund for Claims on Emissions Deception," *New York Times*, December 17, 2015. Feinberg designed and managed the claim compensation facility established by BP after the Gulf oil spill.

⁸ As described further below, similar consumer class actions against VW were filed in Canada at more or less the same time as the U.S. class actions were filed.

⁹ Most states in the United States have a UDAP statute that authorizes public enforcement actions and civil penalties against businesses that violate consumer protection laws.

¹⁰ See New York State Office of the Attorney General, "Statement from A.G. Schneiderman on Volkswagen Investigation," press release, September 22, 2015.

By December 2015, more than 500 private actions against VW, including both consumer complaints and securities class actions, had been filed in more than 60 federal district courts, and three plaintiffs petitioned the Judicial Panel on Multidistrict Litigation (JPML) to centralize the litigation for pretrial preparation. No party opposed centralization.¹¹ On December 8, 2015, the JPML transferred the federal cases to Judge Charles Breyer, an experienced and widely respected judge, in the Northern District of California. In its transfer order, the JPML noted that the litigation had connections to many parts of the United States. “We select Judge Charles R. Breyer as the transferee judge,” the panel wrote, “because he is a jurist who is thoroughly familiar with the nuances of complex, multidistrict litigation by virtue of having presided over nine MDL dockets, some of which involved numerous international defendants. We are confident that Judge Breyer will steer this controversy on a prudent and expeditious course.”¹² Both the consumer complaints and securities class actions were transferred to Judge Breyer. The consumer litigation included claims involving several models of Volkswagens and, ultimately, Robert Bosch GmbH, the German company that allegedly helped design the software that became known as the “defeat device.”¹³

Judge Breyer met the JPML’s expectation, moving quickly to organize the litigation. In January 2016 he appointed (separate) lead counsel and plaintiff steering committees for the securities and consumer lawsuits. As lead counsel for the consumer cases he appointed the nationally known class action litigator Elizabeth Cabraser of Lieff Cabraser Heimann & Bernstein; Robert Giuffra of Sullivan & Cromwell served as lead defense counsel for VW of America.¹⁴ Judge Breyer also appointed former FBI Director Robert Mueller as settlement master.¹⁵ To expedite the litigation, Judge Breyer set briefing, discovery, and status conference schedules and ordered the parties to meet and confer on potentially disputed issues before raising them with him. The early appointment of Mueller as settlement master signaled Judge

¹¹ U.S. Judicial Panel on Multidistrict Litigation, *In Re: Volkswagen “Clean Diesel” Litigation*, transfer order, MDL 2672, December 8, 2015. Under the MDL statute, once the JPML issues a transfer order, subsequent federal lawsuits arising out of the same matter are sent on to the transferee judge. Among the federal lawsuits that were eventually centralized by the JPML were hundreds of cases that were originally filed in state courts and swept into the MDL as a result of VW’s motions to remove them to federal court. Ultimately, Judge Charles Breyer remanded many of these cases to the state courts in which they originated, some of which aggregated them for disposition according to rules similar to the federal MDL statute. For example, hundreds of cases of were consolidated for litigation in Virginia’s Fairfax County Circuit Court. *Volkswagen “Clean Diesel” Litig.*, 102 Va. Cir. 315, *1, 2019 8883668, *1 (2019). The existence of parallel state court litigation illustrates the additional complexity of mass civil litigation in a federal system such as that of the United States.

¹² U.S. Judicial Panel on Multidistrict Litigation, *In Re: Volkswagen “Clean Diesel” Litigation*, transfer order, MDL 2672, December 8, 2015, p. 3.

¹³ David Shephardson, “Bosch Concealed Volkswagen Use of ‘Defeat Device’ Software: Lawyers,” Reuters, September 8, 2016.

¹⁴ Judge Breyer, Cabraser, Giuffra, and Feinberg all participated in the Stanford-RAND roundtable.

¹⁵ All orders referenced in the text can be found on the special MDL docket for the VW litigation established by the Northern District of California and are publicly accessible.

Breyer's expectation that the VW litigation would settle, hopefully rapidly. The court record shows that once the MDL litigation began, Feinberg worked alongside Mueller to facilitate settlement of the litigation on behalf of VW.

The multistate attorneys general knew that most of the prominent players in the VW scandal, including the U.S. Department of Justice (DOJ) Civil Division, EPA, CARB, the Federal Trade Commission, and the leading private plaintiff attorneys, were collected in the Northern District of California under the umbrella of the MDL, which would therefore be a site of settlement of discussions and other developments. Although they had to maintain their independence and the threat of bringing dozens of separate lawsuits against VW in jurisdictions all over the country, the multistate attorneys general understood that it would be in their interests to stay in touch with the MDL process. To keep abreast of information and developments, the Executive Committee wrote to Judge Breyer in January 2016 to inform the court of the attorneys general's investigations, claims, remedies, and readiness to participate constructively in potential global settlement discussions, albeit without submitting to the jurisdiction of the MDL court. The multistate Executive Committee also communicated frequently with the other plaintiffs in the Volkswagen MDL, including particularly the Plaintiff Steering Committee, regarding the scope of consumer remedies.

As is normal in U.S. civil litigation, plaintiff law firms invested their time and subsidized their expenses with the expectation that they would ultimately be reimbursed and rewarded if their clients prevailed. Early in the litigation, Judge Breyer issued an order detailing what expenses would be considered as contributions to creating a "common benefit" fund if the plaintiffs prevailed and setting standards for counsel to record time and expenses and for lead counsel to oversee finances. He noted that if he were to ultimately certify a class, fees and expenses would be awarded according to Rule 23(h), which authorizes judges to award fees in class action litigation.

Early on, Judge Breyer indicated that his primary concern was remediation. Liability was not an issue, in his view, as it had been conceded by VW in September of the previous year. At a case management status conference on February 25, 2016, which included representatives of the DOJ, federal EPA, and CARB, as well as plaintiff and defense counsel, he asked: "What remedies are being proposed by Volkswagen to address the immediate problem of hundreds of thousands of vehicles on the streets and highways of the United States which are not in compliance with the law?"¹⁶ The transcript reveals that settlement discussions among government regulators, VW of America's German parent company, plaintiff and defense counsel, Mueller, and Feinberg were already quite advanced. From the record, it appears that remediation rather than agreement on damages for consumers was the sticking point.

At the next month's status conference, Judge Breyer expressed his unhappiness that a remediation solution had still not been found but also a willingness to wait another month for it or for some other sort of solution, such as a vehicle buyback. If a plan were not forthcoming

¹⁶ Transcript of Proceedings, *In re Volkswagen "Clean Diesel" Litigation*, MDL 2672, Document 1270, February 25, 2016, p. 7.

by then, he warned, he would proceed to set a date for a summer bench trial on “declaratory, injunctive and equitable relief.”¹⁷

In the spring of 2016, while the investigation of the attorneys general continued, the multistate Executive Committee took part in a mediation with VW under the auspices of Mueller. The mediation and premediation briefing focused heavily on the states’ environmental and consumer law civil penalties—the latter being a remedy that is unique to the states. Although the mediation did not directly lead to settlement, it helped sharpen the issues and ultimately laid the groundwork for further developments.

On April 21, 2016, approximately four months after having been appointed to oversee the litigation, Judge Breyer announced that he had been notified that agreements in principle had been reached as to remediation between the government regulators and VW and as to compensation to consumers between plaintiff counsel and VW. Broadly, consumers were to be offered the options of applying for a vehicle buyback or for a modification of their vehicle in accordance with agreements between regulators and the company. Judge Breyer ordered the parties to file a proposed settlement agreement by June 21 and set July 26 for hearing on a preliminary approval of the proposed settlement, prior to formally notifying class members of the terms of the settlement and their opportunity to file objections to those terms or to opt out, if they preferred—all in accordance with Rule 23 rules and practice.¹⁸ The parties submitted a proposed settlement to Judge Breyer for his preliminary approval on June 28, 2016.

The proposed settlements of consumer claims resolved neither the multistate states’ nor the federal government’s civil environmental penalty claims, nor federal criminal claims against Volkswagen, Audi, and Porsche. During the summer of 2016, settlement negotiations between the multistate Executive Committee and VW began to break down. Shortly thereafter, a significant number of states simultaneously gave presuit notice to VW, Audi, and Porsche that they were prepared to file lawsuits around the country. On July 19, 2016, the New York, Maryland, and Massachusetts attorneys general filed suit against VW, Audi, and Porsche for violation of state environmental laws, seeking civil penalties.¹⁹

Then, just as VW was preparing to announce a partial global settlement resolving most of the civil claims against it in the federal MDL, it simultaneously reached a settlement agreement with the 43 jurisdictions that made up the multistate attorneys general group.

¹⁷ Transcript of Proceedings, *In re Volkswagen “Clean Diesel” Litigation*, MDL 2672, Document 17, March 24, 2016.

¹⁸ Transcript of Proceedings, *In re Volkswagen “Clean Diesel” Litigation*, MDL 2672, Document 1439, April 21, 2016, pp. 5–10. At the April status conference, the judge admonished the lawyers not to share the settlement provisions publicly, lest consumers who were anxious for information form opinions based on incomplete information. Notwithstanding this, the transcript is now publicly accessible on the court’s website.

¹⁹ See New York State Office of the Attorney General, “NY A.G. Schneiderman, Massachusetts A.G. Healey, Maryland A.G. Frosh Announce Suits Against Volkswagen, Audi and Porsche Alleging They Knowingly Sold over 53,000 Illegally Polluting Cars and SUVs, Violating State Environmental Laws,” press release, July 19, 2016b.

The “multistate settlement” with Volkswagen that was negotiated by the state attorneys general called for a payment of more than \$1,100 in UDAP civil penalties per affected vehicle, or \$443.5 million total (for approximately 403,000 vehicles), as well as injunctive relief prohibiting future deceptive advertising, marketing, and sales practices.²⁰ The multistate settlement also incorporated by reference the consumer and environmental injunctive remedies in the contemporaneously settled private consumer class action, Federal Trade Commission, and DOJ settlements, including the consumer buyback or fix option, additional consumer restitution, an extended warranty, and a \$2.95 billion mitigation trust fund that continues to distribute money for emission-reducing projects through the states.²¹ Finally, under the multistate settlement, VW agreed to pay \$20 million to the National Association of State Attorneys General to pay back the \$1.5 million grant that supported the public enforcement activities and for consumer protection oversight, training, and enforcement grants for future multistate groups of attorneys general.

After notice and hearing, Judge Breyer approved the first VW consumer class action settlement on October 25, 2016, about ten months after the JPML transferred the VW litigation to him.²² On the same date, Judge Breyer approved a consent decree ending parallel litigation brought by the federal government and the state of California, binding VW to various terms of the consumer settlement, including the establishment of the Environmental Trust Fund, expenditures to promote zero-emission vehicles, and the removal or retrofitting of vehicles that were out of compliance with emission standards.²³ In May 2017, he remanded actions brought by 12 states other than California to their respective state courts.²⁴

Ultimately, the VW consumer litigation in the Northern District of California produced three settlements, one each for two groups of different automobile models, distinguished by their engine size, and a separate settlement with Bosch. The settlements offered consumers who owned these vehicles as of September 18, 2015 (the date the existence of the “defeat device” became public) a choice of having VW buy back the vehicle immediately or waiting to find out whether VW could modify the vehicle in a manner that would satisfy federal and California state regulators (in which case the company would do so). Under the terms of the first settlement, owners of 2.0-liter engine cars who chose the buyback would receive an amount calculated as 20 percent of their vehicle’s value in September 2015 *prior* to

²⁰ New York State Office of the Attorney General, “A.G. Schneiderman Announces Partial Multistate and Federal Settlements of Up to \$15 Billion with Volkswagen, Audi and Porsche, Including Unprecedented Relief for Defrauded New Yorkers,” press release, June 28, 2016a.

²¹ See New York State Office of the Attorney General, 2016a.

²² In re Volkswagen “Clean Diesel” Litigation, “Order Granting Final Approval of the 2.0-Liter Consumer and Reseller Dealership Class Action Settlement,” MDL 2672, Document 2102, October 25, 2016.

²³ In re Volkswagen “Clean Diesel” Litigation, “Order Granting Entry of Consent Decree,” MDL 2172, Document 2103, October 25, 2016.

²⁴ In re Volkswagen “Clean Diesel” Litigation, “Order Granting Motions to Remand,” MDL 2172, Document 3259, May 23, 2017.

the revelation of the “defeat device,” plus \$2,986.73. The minimum any owner choosing this option would receive was \$5,100, and some owners could be eligible for as much as \$10,000.²⁵ In addition, VW agreed to pay \$2.7 billion into a trust to support environmental programs nationally to reduce pollution in an amount equal to the estimated pollution caused by the “clean diesel” vehicles that had deliberately evaded emission control. On top of that, VW committed to expend \$2 billion encouraging the purchase of zero-emission vehicles.²⁶ The provisions of the later settlement with owners of 3.0-liter cars were somewhat more complicated, but it also offered owners a choice of a buyback or a vehicle modification and committed VW to pay an additional \$225 million into the environmental trust fund and \$25 million more to promote zero-emission vehicles.²⁷

Soon after the terms of the first consumer class action settlement became public, the media began to speculate about the size of attorney fees, implying or asserting that the attorneys’ fees, which would likely be calculated as a fraction of the settlement fund, would be disproportionately high, relative to the amounts individual class members would receive—a popular trope promoted by corporate interest groups in the United States and elsewhere. Applying conventional rules for calculating class action fees, commentators suggested the lawyers might earn as much as \$3.5 billion in fees.²⁸ To dampen this negative publicity—at a time when fees had not yet either been requested or awarded—Judge Breyer, in an unusual move, asked the lead plaintiff counsel to informally indicate the scale of the award they might request. On August 2016, lead counsel filed a statement indicating they would request a total attorney fee award of not more than \$325 million, plus expenses of not more than \$8.5 million—to cover the work of 22 law firms that had contributed to the resolution of the

²⁵ Charles R. Breyer, “Executive Summary of Final Class Settlement Program (2.0 Liter Engine Vehicles),” U.S. District Court, Northern District of California, undated-a.

²⁶ Breyer, undated-a.

²⁷ Charles R. Breyer, “Executive Summary of Final Class Settlement Program (3.0 Liter Engine Vehicles),” U.S. District Court, Northern District of California, undated-b.

²⁸ Several studies have mapped the ratio of attorney-fee awards (including expenses) when the class prevails to the dollar amount of class settlement funds over time. From 1993 to 2008, the average award in federal class actions was 23 percent of the class settlement; from 2009 to 2013, the average was 27 percent of the class settlement. See Theodore Eisenberg, Geoffrey Miller, and Roy Germano, “Attorney Fees in Class Actions, 2009–2013,” *NYU Law Review*, Vol. 92, No. 4, October 2017. Because data sources differ somewhat over time, it is possible that these differences reflect differences in sample composition rather than changes over time in judges’ reasoning when awarding fees. All of the empirical studies published to date show that the percentage of the fund that judges award declines as the total value of settlements increases. Few settlement funds, however, are as large as the amount plaintiff class counsel obtained for consumers in the VW litigation; awards in extremely high-value class action litigation are *sui generis*. For data on fee awards prior to 2009, see Theodore Eisenberg and Geoffrey P. Miller, “Attorney Fees in Class Action Settlements: An Empirical Study,” *Journal of Empirical Legal Studies*, Vol. 1, March 2004; Theodore Eisenberg and Geoffrey P. Miller, “Attorney Fees and Expenses in Class Action Settlements: 1993–2008,” *Journal of Empirical Legal Studies*, Vol. 7, June 2010; and Brian T. Fitzpatrick, “An Empirical Study of Class Action Settlements and Their Fee Awards,” *Journal of Empirical Legal Studies*, Vol. 7, No. 4, December 2010.

class action.²⁹ On November 8, 2016, plaintiff class counsel for the 2.0-liter engine vehicle settlement filed a motion requesting \$175 million for fees and expenses.³⁰ Four months later, on March 17, 2017, Judge Breyer awarded plaintiff class counsel the full amount requested.³¹

On March 30, 2017, the attorneys general of ten states, all of which had adopted California's stringent emissions standards, jointly reached settlement with VW, Audi, and Porsche for civil environmental penalties in the amount of more than \$1,250 per vehicle, or about \$157 million in total (for approximately 125,000 vehicles).³² In May 2017, Judge Breyer remanded actions brought by 12 other states to their respective state courts.³³

In all, in the federal consumer class action litigation, VW agreed to pay \$11.2 billion directly to consumers,³⁴ as well as \$2.9 billion to the Environmental Trust Fund established under the settlements. For its role in the deception, which it long disputed, Bosch agreed to pay \$275 million to consumers. For their efforts to resolve the consumer litigation, plaintiff class counsels were awarded a total of \$352 million in fees and expenses, about 3 percent of the amount awarded to the consumers.³⁵ In June 2019, a VW spokesperson said that, up to that point, Volkswagen AG had spent more than €1.7 billion on legal fees and other consulting expenses connected to the “clean diesel” scandal to date.³⁶ How much VW of America and Bosch paid their lawyers is not public.

The deadline for consumers to file claims under the 2.0-liter settlement was September 1, 2018, although the period for appeals of decisions extended through early 2019.

²⁹ In re Volkswagen “Clean Diesel” Litigation, “Settlement Class Counsel’s Statement of Additional Information Regarding Prospective Request for Attorneys’ Fees and Costs,” MDL 2172, Document 1730, August 10, 2016.

³⁰ In re Volkswagen “Clean Diesel” Litigation, “Plaintiffs’ Notice of Motion and Motion for Attorneys’ Fees and Costs Under Fed. R. Civ. P. 23(H) and Pretrial Order Nos. 7 and 11; Memorandum of Points and Authorities in Support Thereof,” MDL 2172, Document 2175, November 8, 2016.

³¹ In re Volkswagen “Clean Diesel” Litigation, “Order Granting Plaintiffs’ Motion for Attorney Fees and Expenses Relating to 2.0 Liter Settlement,” MDL 2172, Document 3053, March 17, 2017.

³² New York State Office of the Attorney General, “A.G. Schneiderman Announces Volkswagen to Pay New York \$32.5 Million—Marking First-Ever NY State Environmental Enforcement Penalty Against an Automaker for Emissions Violations,” press release, March 30, 2017.

³³ In re Volkswagen “Clean Diesel” Litigation, “Order Granting Motions to Remand,” MDL 2172, Document 3259, May 23, 2017.

³⁴ This was \$10.33 billion to owners of 2.0-liter vehicles plus \$902 million to owners of 3.0-liter vehicles.

³⁵ This was \$175 million for the 2.0-liter settlement plus \$125 million for the 3.0-liter settlement plus \$52 million for the settlement with Bosch. In addition, VW negotiated settlements with automobile dealerships and federal and state regulators, as well as groups of plaintiffs not included in the consumer classes. To settle the dealership class action, VW agreed to pay \$1.19 billion. But because that litigation proceeded in parallel with the consumer litigation and availed itself of work performed for the consumer litigation, class counsel for the dealership was awarded only \$2.9 million. At the time of this writing, separate securities class action litigation is still ongoing.

³⁶ Volker Votsmeier, “Berater im Dieselskandal kosten den VW-Konzern mehr als 1,7 Milliarden Euro,” *Handelsblatt*, June 14, 2019.

As of November 18, 2018, 482,600 consumers had submitted claims to the claims administrator for VW to review, and 467,700 consumers had been issued offer letters, the aggregate value of which was \$8.4 billion.³⁷ As of June 2019, 71,927 members of the later-certified and -settled 3.0-liter vehicle class action had submitted claims to the claims administrator for VW to review, and 68,032 consumers had been issued offer letters, with an aggregate value of about \$1.1 billion.³⁸

Some 4,000 individuals ultimately opted out of the consumer class settlements, some of whom sought to have their cases remanded to the state courts where they had filed their claims. Judge Breyer denied their motions for remand.³⁹ The claims of ten consumers who opted out of the settlement were tried in spring 2019, in a complex three-phase trial in which Judge Breyer first decided a substantive legal matter and a jury then decided, *seriatim*, whether the plaintiffs merited compensation for economic damages or punitive damages. The jury awarded a total of \$5,747 in economic damages to five of the plaintiffs and nothing to the remaining five, as well as a total of \$100,000 in punitive damages to the group of plaintiffs. Judge Breyer later reduced the punitive damages award to \$23,000 for all of the plaintiffs.⁴⁰ Legal commentators deemed the trial verdicts proof of the failure of the plaintiffs’ opt-out strategy.⁴¹

Investors’ claims against VW for violation of U.S. securities litigation were limited by the U.S. Supreme Court’s decision in *Morrison v. Australia National Bank*,⁴² holding that the Securities and Exchange Act does not provide extraterritorial jurisdiction to federal courts.⁴³ As a result, the locus of securities litigation arising out of the “clean diesel” scandal is Germany, as described below. Purchasers of American Depository Receipts, a form of security traded on U.S. exchanges, whose claims were included in the wide-sprawling litigation assigned to Judge Breyer, ultimately negotiated a \$48 million settlement, including attorneys’ fees and expenses, with VW.⁴⁴

³⁷ In re Volkswagen “Clean Diesel” Litigation, “Report on the 2.0 Liter Settlement,” MDL 2172, Document 5585, November 26, 2018.

³⁸ In re Volkswagen “Clean Diesel” Litigation, “Report on the 3.0 Liter Settlement,” MDL 2172, Document 3704, June 13, 2019.

³⁹ In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prods. Liab. Litig., No. 2672 CRB (JSC), 2019 BL 54179 (N.D. Cal. Feb. 19, 2019).

⁴⁰ Linda Chiem, “Opt-Out Drivers’ Claims Trimmed Ahead of VW Bellwether,” Law360, February 4, 2019; Sullivan & Cromwell LLP, “S&C Leads Volkswagen to Victory in First Bellwether Trial over Vehicle Emissions,” March 17, 2020.

⁴¹ Jenna Greene, “Daily Dicta: VW Opt-Out Plaintiffs Crash with Minuscule Damages,” Law.com, March 5, 2020.

⁴² 561 U.S. 247, 130 S. Ct. 2869 (2010).

⁴³ Pub. L. 73-291, Securities and Exchange Act of 1934, June 6, 1934.

⁴⁴ In re Volkswagen “Clean Diesel” Litigation, “Order Granting ADR Plaintiffs Motion for Preliminary Approval of Settlement,” MDL 2172, Document 3519, November 28, 2018.

Criminal investigations of VW and its top manager proceeded in parallel with private civil litigation in the United States. In January 2017, VW agreed to plead guilty to conspiring to defraud the U.S. government and consumers and to violating the federal Clean Air Act,⁴⁵ as well as to pay \$2.8 billion in criminal fines, and a federal grand jury in the Eastern District of Michigan indicted six VW executives. One of the executives was arrested early that month while visiting Miami.⁴⁶ A year later the grand jury indicted Martin Winterkorn, the former CEO.⁴⁷ As described below, criminal prosecution took place in Germany as well.

Canada

On September 18, 2015, the Canadian Environmental Protection Agency announced that it was issuing a notice of violation of the Clean Air Act for several model years of the VW Jetta, Golf, Passat, Beetle, and Audi cars sold in Canada. Less than a month later, the agency issued a second notice of violation for several other Audi models, as well as the Porsche Cayenne and VW Touareg.⁴⁸

Six days after the initial announcement, a Canada-wide class action was commenced in Ontario seeking to represent individuals who owned or leased one of the affected vehicles. Nine named plaintiffs residing in various cities in Ontario sued Volkswagen AG, as well as the Canadian and U.S. VW and Audi subsidiaries. The plaintiffs sought general and punitive damages of more than C\$4 billion or, alternatively, rescission of the purchase price of the vehicles. The allegations were founded in negligence (in the design of injection and emissions systems), negligent misrepresentations (that the vehicles were an environmentally friendly purchasing option), breach of warranties, and various statutory causes of action.

Several other class actions were filed in Ontario and in other Canadian provinces soon thereafter. Several firms entered into a consortium agreement, pursuant to which they agreed to proceed with one main action and stay the remaining cases. Firms outside of the consortium, however, maintained that their actions should be allowed to proceed. Consequently, a motion was brought to determine which action(s) could proceed while the remaining would be stayed—in Canada, termed a *carriage* motion. In December 2015, an Ontario judge granted carriage to the eight-firm consortium in the *Quenneville* class action.⁴⁹ The judge

⁴⁵ Pub. L. 88-206, Clean Air Act of 1963, December 17, 1963.

⁴⁶ U.S. Department of Justice, “Volkswagen AG Agrees to Plead Guilty and Pay \$4.3 Billion in Criminal and Civil Penalties; Six Volkswagen Executives and Employees Are Indicted in Connection with Conspiracy to Cheat U.S. Emissions Tests,” press release, January 11, 2017.

⁴⁷ U.S. Department of Justice, “Former CEO of Volkswagen AG Charged with Conspiracy and Wire Fraud in Diesel Emissions Scandal,” press release, May 3, 2018.

⁴⁸ *Quenneville v. Volkswagen Group Canada Inc.*, Statement of Claim (court file no. CV-15-22729-00CP).

⁴⁹ *Quenneville v. Volkswagen Group Canada Inc.* (court file no CV-15-537029-CP), carriage order dated 4 December 2015 [unreported].

stayed the other actions and ordered that no similar actions could be commenced without leave of the court. Subsequent hearings were held as a result of breaches of the carriage order by one of the unsuccessful firms.⁵⁰ The Ontario judge’s granting of the carriage motion had a similar practical effect to the U.S. JPML’s order to centralize the federal litigation against VW before Judge Breyer.

Cooperation between U.S. and Canadian counsel was informal and constrained by both public formal legal barriers (protective orders) and private agreements to keep discussions confidential. U.S. counsel could mostly provide only what was in the public record. Protective orders regarding the disclosure of documents were obtained in both the United States and Canada.

On December 16, 2016, two months after the first U.S. consumer class action settlement was approved, the Canadian parties entered into a proposed settlement of the *Quenneville* class action involving the 2.0-liter vehicles. Three days later, the plaintiffs’ motion for certification for settlement purposes was granted in its entirety.⁵¹ The judge certified a class of “all persons” (excluding residents of Quebec, who were members of a separate class action in that province) who were registered owners or lessors of eligible vehicles. Interestingly, the judge included in the class definition any resident who purchased their vehicle from a Canadian dealership even if the vehicle was registered in the United States. Conversely, Canadian residents who purchased their vehicles from an American dealership were members of the U.S. settlement. The judge found ample evidence of commonality but certified only one common issue: “Did software installed in settlement class members’ vehicles allow those vehicles to operate one way when recognizing driving in NOx emissions laboratory testing and in a different way when the vehicles were in road operation and did class members suffer damages as a result of such conduct?”⁵²

A settlement approval motion was heard on March 22, 2017, in Quebec and on March 31, 2017, in Ontario for the 2.0-liter diesel vehicles. The reasons for approving the settlement were released in late April 2017.⁵³ The settlement agreement encompassed both the Ontario and Quebec actions and therefore covered all Canadian class members. As none of the vehicles could be returned to their original condition, rescission was not an available remedy. Instead, VW agreed to pay benefits of up to C\$2.1 billion to 105,000 class members (less the 36 individuals who had opted out of the actions). Every class member was entitled to defined cash payments between \$5,000 and \$8,000 each, depending on the model, and a choice to either (1) sell or trade in the vehicle or terminate the lease without penalty or (2) keep the vehicle and receive an emission modification and extended emission warranty. The original claims deadline of September 1, 2018, was subsequently extended to December 30, 2018.

⁵⁰ *Quenneville v. Volkswagen*, 2016 ONSC 959; *Quenneville v. Volkswagen*, 2016 ONSC 4607.

⁵¹ *Quenneville v. Volkswagen*, 2016 ONSC 7959.

⁵² *Quenneville v. Volkswagen*, 2016 ONSC 7959 at para. 14.

⁵³ *Quenneville v. Volkswagen*, 2017 ONSC 2448.

The settlement agreement provided that VW would pay class counsel's fees over and above the amounts designated for the class in settlement of their claims. Class counsel and VW could not come to an agreement, giving rise to a contested fee motion in June 2017. Class counsel sought C\$65 million in fees, plus taxes and disbursement. After the motion was argued but before the court released its decision, the parties agreed to settle the issue of class counsel fees; VW agreed to pay to class counsel C\$31.2 million in fees, inclusive of taxes and disbursements. This amount was then approved by the court.⁵⁴ VW also agreed to pay Quebec class counsel C\$9.9 million.

In August 2017, the parties, including representatives of the U.S. and German defendants and of the Canadian Competition Bureau, entered into formal settlement negotiations in respect of the 3.0-liter diesel vehicles. The retired chief justice of the Quebec Superior Court acted as mediator. A settlement was reached in January 2018 and was approved in April 2018 in both Ontario and Quebec.⁵⁵ Like the 2.0-liter settlement, the 3.0-liter settlement encompassed both the Ontario and Quebec actions and therefore all Canadian class members.

The terms of the 3.0-liter settlement largely duplicated the earlier settlement in content, with the primary exception being that no buyback, trade-in, or early lease termination option was offered to a subset of class members who owned or leased a second-generation vehicle. The difference in structure arose from the Canadian Environmental Protection Agency's approval of an emission modification for all second-generation vehicles that brought them into compliance with their originally certified emission standards. Class members with a second-generation vehicle still received a cash payment after completing the modification on their vehicle. In total, VW agreed to pay benefits of up to C\$290.5 million to approximately 20,000 class members with eligible 3.0-liter vehicles. The claims deadline was May 31, 2019, and as of the time of writing, no public information is available regarding the number of class members who submitted successful claims.

The 3.0-liter settlement agreement again provided that VW was to pay class counsel's fees. After another contested motion, the parties reached a resolution, and VW agreed to pay C\$10.2 million in fees and expenses. This amount was then approved by the court.

Like VW car owners in Europe, class members in Canada who opted for the emission-compliant repair complained that the alleged fix had negatively affected the performance of their vehicles. Specifically, they reported an unexpected lag and surge in the acceleration of their vehicles. VW undertook a review of these complaints and ultimately advised class counsel that no safety issue associated with the repair was found. Transport Canada was also advised of the complaints but did not require VW to initiate a recall concerning the reported issue.

The plaintiffs were not satisfied with VW's report and brought a motion for the production of the data and analysis relating to VW's review of the acceleration lag issue. In August

⁵⁴ *Quenneville v. Volkswagen*, 2017 ONSC 3594.

⁵⁵ *Quenneville v. Volkswagen*, 2018 ONSC 2516.

2019, the motion judge dismissed the motion.⁵⁶ He agreed with VW’s interpretation of the settlement agreement and found that class members were not entitled to additional information about the reported lag issue to make an informed decision about their rights under the settlement. The motion judge found that the remedies for any lag issue were not available under—nor precluded by—the settlement agreement.

Two proposed securities class actions on behalf of VW investors were dismissed on jurisdictional grounds.⁵⁷

In addition to the class actions brought on behalf of owners and lessees of cars and purchasers of Volkswagen securities, the Association québécoise de lutte contre la pollution atmosphérique (Quebec Association for the Fight Against Atmospheric Pollution) and André Bélisle filed an application on behalf of all residents of the province of Quebec for the environmental consequences of the use of the software. The Superior Court granted the certification motion in part, authorizing a claim for punitive damages. The Court of Appeal dismissed a motion by VW for leave to appeal that decision. The Supreme Court of Canada granted leave to appeal to VW, and arguments were heard on November 13, 2019. The main issue on appeal was whether the representative plaintiffs had standing to sue on behalf of all residents of the province, thereby usurping the regulatory role of the state. In a rare oral decision from the bench, the Supreme Court of Canada dismissed VW’s appeal, allowing the case to proceed on the merits.⁵⁸

In December 2019, four years after the scandal originally broke, charges were brought under the Canadian Environmental Protection Act against Volkswagen AG for importing vehicles that company executives knew violated emissions standards.⁵⁹ VW ultimately pleaded guilty to all 60 counts and was fined C\$196.5 million, the largest financial penalty in Canadian history for an environmental offense.⁶⁰ In addition, VW has paid regulatory fines to the Competition Bureau in the sum of C\$17.5 million. Environmentalists have been critical that no criminal charges have been laid against VW, despite the admissions made by VW in U.S. proceedings.⁶¹

⁵⁶ *Quenneville v. Volkswagen*, 2019 ONSC 4668.

⁵⁷ *Leon v. Volkswagen AG*, 2018 ONSC 4265; *Chandler c. Volkswagen Aktiengesellschaft*, 2020 QCCS 1202.

⁵⁸ *Volkswagen Group Canada Inc. v. Association québécoise de lutte contre la pollution atmosphérique*, 2019 SCC 53.

⁵⁹ Emerald Bensadoun, “Canada Charges Volkswagen 4 Years After Emissions Scandal,” *Global News*, December 9, 2019.

⁶⁰ Emily Jackson, “Ottawa Slaps Volkswagen with \$196.5-Million Fine for ‘Dieselgate’—Largest Ever Environmental Penalty in Canada’s History,” *Financial Post*, January 22, 2020.

⁶¹ Stephen Maher, “How Did VW Avoid Criminal Charges in Canada over Its Emissions Cheating?” *Maclean’s*, January 21, 2020.

Australia

In Australia, the class action regime is, in theory, available to both consumers and shareholders of VW. Only consumers, however, brought class actions in Australia against VW and other entities, which, after almost five years of litigation, were settled in the fall of 2019. Settlement approval hearings were held in early 2020. The regulatory proceedings were the subject of a penalty hearing in the Federal Court on October 3, 2019.

The class actions were commenced on behalf of the purchasers of *all* affected vehicles in Australia and thus comprised around 100,000 consumers.⁶² Five class actions seeking damages and two regulatory proceedings seeking civil penalties were brought in the Federal Court of Australia. All five class action cases and the two regulatory proceedings were allowed to proceed concurrently during the pretrial stages.⁶³

The five class actions comprised two conducted by the Bannister Law (BL) firm and three conducted by Maurice Blackburn (MB). The BL class actions were commenced in late 2015, not long after the defeat-device scandal became known, and were funded, in part, by a commercial litigation funder. The BL proceedings were strategically confined to the Australian corporations and to strict liability causes of action to expedite resolution of the cases and to reduce costs and forensic complication. This strategy notwithstanding, the BL proceedings took years to advance, as all of the class actions and regulatory proceedings were required to proceed concurrently. The MB class actions were commenced not long after the BL proceedings. MB acted on a no-win, no-fee arrangement, having signed up a large number of class members to a fee and retainer agreement whereby they agreed to pay a share of the costs of conducting the litigation out of any damages successfully recovered.

The five class actions comprised classes that substantially overlapped, although clients of the respective law firms were excluded from the ambit of the classes represented by the other law firm. There was also a difference in the dates of purchase of affected vehicles between the BL and MB class actions, as well as the nature of the damages sought and the identity of some of the corporations sued.

⁶² By way of contrast, the English Group Litigation scheme requires each claimant to commence an individual proceeding in the High Court. Proceedings have been commenced to date by approximately 95,000 UK consumers. Thus, the number of claimants in the Australian and UK proceedings are roughly similar. However, in the UK there are approximately 1.2 million affected vehicles. Thus, the UK claimants compose less than 8 percent of affected consumers in the UK.

⁶³ In the United States, as described above, when multiple lawsuits arising out of the same matter are filed in the federal court system, the JPML usually centralizes the lawsuits in a single court and assigns a single judge to oversee pretrial activity. That judge appoints lead counsel and a plaintiff steering committee to act on behalf of the plaintiffs whose cases have been centralized. If a class is certified, those counsel become class counsel. Neither Canada nor Australia has a statutory procedure akin to an MDL. When multiple lawsuits arising out of the same matter are filed, attorneys for the different plaintiff groups may move to be appointed as lead counsel—that is, to *carry* the litigation. Whether such motions are filed depends on attorney strategy.

The litigation leading up to the settlement was extremely hard fought, marked by numerous interlocutory applications in relation to, *inter alia*, disputed claims of privilege, the overlapping proceedings, notices to admit facts, interrogatories, pleading issues, and discovery. There were many disputes over the production of documents. VW identified more than 100 million potentially relevant documents. Most were in German, and the company contended that any English translations of such documents were privileged. With a view to expediting and reducing the cost of the initial review, Technology Assisted Review using predictive coding was implemented to identify relevant documents.

The VW defendants had provided redacted copies of regulatory determinations by the Kraftfahrt-Bundesamt (German Federal Motor Transport Authority) claiming privilege over the redacted portions. The issue of privilege proceeded to a separate hearing before another Federal Court judge, who upheld VW’s contentions.⁶⁴ There also continued to be considerable procedural disputation in relation to confidentiality orders sought by VW to prevent public disclosure of certain information and documents and whether further interrogatories should be permitted to obtain additional answers to three categories of questions from 79 current and former employees in respect to their roles, responsibilities, and knowledge of various matters over almost a ten-year period.

In addition to the vexed issue of *who knew what and when*, there was continuing controversy over whether the Europe-based respondents (sued in the MB and Australian Competition and Consumer Commission [ACCC] proceedings but not in the BL proceedings) carried on business *in Australia* at relevant times so as to subject them to Australian laws that do not have extraterritorial effect.

Settlement agreements were reached on the eve of the “second-stage” trial, which was due to commence in the Federal Court on September 23, 2019, four years after the initial class actions were commenced. A first-stage trial was held in March 2018, in respect to a number of separate questions, including whether the affected vehicles in Australia are fitted with the illegal “defeat devices.” Not long before the start of the first-stage trial, the respondents informed the parties and the court that they did not intend to call any of the experts who had prepared and submitted expert evidence. Thus, the first-stage trial proceeded without the respondents calling any witnesses. The judgment on the separate questions was yet to be handed down when the settlement agreement was reached. This judgment would have been of some international significance, given that the grounds on which VW had denied that the Australian cars were fitted with illegal defeat devices are also being relied on in proceedings in other jurisdictions.

Under the terms of the settlement reached in September 2019, the respondents to the five class actions agreed to pay an amount of between A\$87 million and A\$127.1 million, depending on the number of class members who participate. Average payments to participating class members were projected to be between a maximum of A\$2,900 and a minimum of A\$1,400. The respondents also agreed to pay the legal costs incurred by the applicants and class mem-

⁶⁴ *Cantor v Audi Australia Pty Ltd* [2016] FCA 1391 (Bromwich J).

bers on top of the compensation amounts. The total costs incurred by the parties exceed A\$100 million.

Having made orders approving of the settlement of the Australian VW class actions on April 1, 2020, a judgment by Justice Foster was handed down on May 13, 2020.⁶⁵ This set out his reasons for approving the settlement and rejecting the funding application made by the funder in the two BL proceedings. Importantly, Justice Foster determined that the relevant Australian vehicles were fitted with “defeat devices” that were prohibited under Australian regulations, which mirrored European regulations.⁶⁶ As at this date, approximately 40,000 of the eligible class members had registered claims within the required time. Thus, it is presently projected that the total settlement payment, apart from legal fees, will be approximately A\$120 million and that eligible class members will receive payments in the range A\$1,589 to A\$6,554, with an average of A\$2,800. Justice Foster approved an additional amount of around A\$51 million in legal fees and expenses to be paid to the BL and MB law firms for conducting the class action proceedings. VW has also agreed to pay the additional costs of implementing the settlement.

Vexed issues in the Australian class actions included the proper measure of damages under Australian law and whether the software “fix” that was implemented in many instances had an adverse impact of the vehicles, including on petrol consumption.

Interestingly, one of the measures of damages sought by the applicants in the BL proceedings was a refund of the purchase price, less an allowance for period of usage (based on kilometers driven compared with the expected lifetime kilometers), following a number of decisions of German courts. This would now appear to have been accepted by Germany’s highest court in a recent decision.⁶⁷

The regulatory proceedings seeking civil penalties were commenced by the ACCC in 2016 and 2017. In the regulatory proceedings, the ACCC relied on causes of action in respect to conduct alleged to be misleading or deceptive or likely to mislead or deceive and false representations. The relief sought encompassed pecuniary penalties and corrective advertising. The regulatory proceedings were settled not long after the settlement of the class actions. The regulator and the defendants in the regulatory proceedings agreed on a civil penalty of A\$75 million. However, Justice Foster imposed a higher penalty of A\$125 million, which is now on appeal.

Up to and following the settlement agreement being reached, evidence and submissions were filed in respect to VW’s application for a continuation of confidentiality protection for

⁶⁵ *Cantor v Audi Australia Pty Limited (No 5)* [2020] FCA 637.

⁶⁶ United Nations Economic Commission for Europe, Regulation 83, Uniform Provisions Concerning the Approval of Vehicles with Regard to the Emission of Pollutants According to Engine Fuel Requirements—Applicability, December 27, 2006. This is an international instrument given legal effect in Australia through Alternative Design Rule (ADR) 79, Sec. 6.1.

⁶⁷ See the decision of the Bundesgerichtshof, 25 May 2020, VI ZR 252/19, available in the German language. This decision is discussed below.

documents and evidence in the proceedings. The company sought suppression orders in respect to the names of various individuals involved or implicated in the emissions scandal and technical data, engineering specifications, and engine software codes and maps in respect to affected vehicles, which are alleged to constitute trade secrets.

Extensive affidavit evidence was filed in support of the confidentiality orders sought. In part, the orders sought were to prevent the disclosure of answers to interrogatories and the identity and roles and responsibilities of numerous persons employed, or previously employed, by one or more of the respondents or related corporate entities, on the basis that disclosure had the potential to detrimentally and unfairly affect or contaminate criminal prosecutions of a number of persons already under way or foreshadowed in Germany and in the United States—prosecutions that are or might be based on the same substrate of facts, so this court could be called on to make findings in the proceedings concerning the “clean diesel” scandal.⁶⁸

Orders were made by Justice Foster on September 23, 2019, extending the confidentiality regime until December 18, 2020, or further order of the court.⁶⁹

The Australian experience to date in the VW diesel emission litigation is illustrative of the ongoing problem of costs and delay in class action litigation. Substantial costs incurred in class action litigation are an obvious problem in such jurisdictions as Australia, where the representative applicants may be liable to pay the respondents’ costs if the litigation is unsuccessful.

Notwithstanding the inordinate delay and substantial costs incurred to date, it would appear that the statutory class action regime in Australia, and the substantive law able to be relied on by both consumers and investors who have suffered loss as a result of unlawful conduct, are more advantageous than the procedural redress mechanisms and substantive law applicable in many other jurisdictions outside North America, including most if not all of those in Europe.

However, it is equally clear that the recent Australian class action litigation settlements are for substantially lower amounts than the corresponding settlements in both the American and Canadian litigation.

Germany

The “clean diesel” scandal created several waves and types of litigation in Germany. These waves have not come to an end (as of June 2020), so only a current snapshot can be provided. Regardless of how things develop, however, it can already be said that the VW litigation has made a major impact on German legal culture.

⁶⁸ *Cantor v Audi Australia Pty Limited (No 4)* [2019] FCA 1633 [10], Foster J.

⁶⁹ *Cantor v Audi Australia Pty Limited (No 4)* [2019] FCA 1633 [10], Foster J.

Two main types of litigation arose as a result of the scandal: There are claims brought by customers who complain about the emission fraud regarding the vehicles they have bought, and there are capital market claims brought by investors in VW shares or other financial instruments issued by entities within the VW group. These securities typically lost some value after the emission fraud was uncovered, so these investors can now sue for damages under applicable provisions of German securities laws.⁷⁰

The investor actions are by far the most relevant in economic terms. They have been brought mainly against Volkswagen AG before the court in Braunschweig, and the total sum of claims seems to be over €9 billion. Most of these actions are financed by third-party litigation financing companies. They are typically brought by institutional investors, including some very large ones, such as the Norwegian state fund, which is represented by the U.S. law firm Quinn Emmanuel Urquhart & Sullivan. Most of these actions have been consolidated into a model action under the German KapMuG, which is currently pending before the higher regional court in Braunschweig. The court selected Deka Investment to be the model plaintiff, represented by the TILP Group. Deka is part of the Sparkassen group (regional savings banks) and therefore represents a large number of retail investors.

There is some jurisdictional uncertainty with regard to investor actions that are brought against Porsche SE, which is the holding company of the VW group. These actions are of a lower monetary volume but still approach €1 billion altogether. Many of them have been brought before the lower court in Stuttgart, where Porsche's headquarters are located. The local court tried to initiate separate KapMuG proceedings in Stuttgart for these claims.⁷¹ The Oberlandesgericht (the Regional Court of Appeals) in Stuttgart rejected this proposal and argued that because of the underlying identical facts—the emission manipulation—all such claims should be integrated into the Braunschweig model proceedings; the Oberlandesgericht therefore refused to open up separate KapMuG model proceedings in Stuttgart.⁷² On the other hand, the Oberlandesgericht in Braunschweig ruled that it will not hear cases against Porsche SE and that those cases must be brought in Stuttgart for jurisdictional reasons.⁷³ The German federal court will have to decide these issues with regard to jurisdiction and with regard to the scope of the KapMuG proceedings.

After the Oberlandesgericht in Stuttgart rejected the idea of KapMuG proceedings, the lower court decided two individual cases against Porsche SE, ordering damages in the amount

⁷⁰ Because these investors come from all over the world, there is a theoretical discussion with regard to what the applicable law would be for such investor claims; see, e.g., Dorothee Einsele, "Kapitalmarktrecht und Internationales Privatrecht," *RabelsZ*, Vol. 81, 2017. However, the plaintiffs typically base their argument on German law, and the German courts seem to use German law, notwithstanding the discussion in the literature.

⁷¹ Landgericht Stuttgart, referral decision to initiate KapMuG proceedings (*Vorlagebeschluss*) of 28 February 2017, file no. 22 AR 1/17 Kap.

⁷² Oberlandesgericht Stuttgart, decision of 27 March 2019, file no. 20 Kap 2/17, 3/17 and 4/17.

⁷³ Oberlandesgericht Braunschweig, decision of 12 August 2019, file no. 3 Kap 1/16.

of €46 million on the basis of a violation of capital market laws.⁷⁴ These cases are currently under appeal. The judge at the lower court, Judge Fabian Richter Reuschle, later was removed from the cases because his wife had brought a consumer action against VW, so the cases had to be assigned to a different judge.⁷⁵

In the area of customer claims, one must distinguish between claims against the VW dealers and against the car manufacturers—for example, Volkswagen AG itself. The dealerships, where the affected cars were mostly bought, normally are separate legal entities that have contractual relations with Volkswagen AG but are not necessarily part of the VW corporate group. Therefore, the cases against the dealers are dispersed all over Germany, and there are many differing judgments by local courts, both for and against the VW dealers. Most of these cases are financed through legal expenses insurance, which is widely available in Germany. The insurers first denied cover for such actions but were later forced by court decisions to provide it as the wave of litigation grew and as more plaintiff-friendly judgments were handed down.⁷⁶

From 2016 to 2018, it was VW’s practice to buy out successful plaintiffs with generous settlements to avoid a negative precedent by an appeals court. In early 2019, the Bundesgerichtshof (Federal Court), the highest court in civil matters, made an unusual move with regard to these practices by publishing an opinion in a case even though it had been settled a few days before the judgment was to be announced.⁷⁷ In this opinion, the Bundesgerichtshof stated that the affected cars were *defective* in the legal sense, so most lower courts now follow this opinion and allow plaintiffs to rescind the contract with the dealers if they bought their cars prior to September 22, 2015, and if they requested their cars to be fixed before the software update was available.

With regard to claims against the manufacturer, the legal situation is different because there are only tort claims available for the plaintiffs. Many individual plaintiffs combined their action against the dealer with an action against the manufacturer. As of June 2020, there were about 65,000 individual customer lawsuits in the German court system.⁷⁸ Furthermore, actions against the manufacturer are the domain of claim-aggregation schemes organized by litigation-financing companies. The biggest of these companies is myRight, which is financially backed by Burford Capital and is represented by the Hausfeld law firm, which has estab-

⁷⁴ *Wolverhampton City Council v. Porsche SE*, Landgericht Stuttgart, decision of 24 October 2018, file no. 22 O 101/16; *Greenwich (Japan) Ltd et al v. Porsche SE*, Landgericht Stuttgart, decision of 24 October 2018, file no. 22 O 348/16.

⁷⁵ Votsmeier Volker, “Landgericht Stuttgart erklärt Dieselgate-Richter für befangen,” *Handelsblatt*, April 30, 2019. Judge Reuschle participated in the Stanford-RAND roundtable.

⁷⁶ See, e.g., Landgericht Düsseldorf, decision of 9 March 2017, file no. 9 O 113/16 (ordering legal expenses insurer to grant cover for litigation against VW).

⁷⁷ Bundesgerichtshof, *Hinweisbeschluss* (advisory decision) of 8 January 2019, file no. VIII ZR 225/17.

⁷⁸ Christoph Noelting and David McHugh, “German Court Ruling Clears the Way to Settle VW Diesel Cases,” AP News, May 25, 2020.

lished a German office. Burford is incorporated in Guernsey, a self-governing British Crown dependency, but its principal offices are in New York, London, and Chicago. The Hausfeld firm was founded by Michael Hausfeld, a prominent U.S. class action lawyer who was formerly a partner at Cohen Milstein, a prominent U.S. plaintiff class action firm; myRight claims to represent about 40,000 individual claims that have been transferred to it in exchange for a 35 percent share in the expected proceeds. VW has attacked this financing scheme as illegal, but as of June 2020, only one German court had ruled on the issue. The Landgericht (Regional Court) in Braunschweig found the scheme to be illegal and dismissed the claim of myRight (which was based on a transfer of rights from a Swiss customer).⁷⁹

In cases in which customers filed their claims against Volkswagen AG, the outcomes have been mixed for several years. In one of the actions against Volkswagen AG, a plaintiff represented by Hausfeld lost an appeal case before the court of appeals in Braunschweig,⁸⁰ but other regional courts of appeals, such as the Oberlandesgericht Koblenz, have found for the plaintiffs.⁸¹ An appeal against a decision by the Oberlandesgericht Koblenz has been decided by the Federal Court. In its landmark decision of May 25, 2020, the Bundesgerichtshof held that there is a damage claim in tort against Volkswagen AG: VW must pay back the purchase price in exchange for taking the car back, but from the purchase price, VW may deduct the usage value of the car for the miles driven with the car when it was in the customer's possession.⁸² It is up to the lower courts to calculate this deduction in a specific case, but it is now clear that the Bundesgerichtshof will, in principle, rule in favor of the VW customers if they bought their cars before VW's public statement relating to the software's deceptive reporting of emissions levels on September 22, 2015. VW has announced that it will seek settlements with the remaining individual plaintiffs, provided that the factual circumstances are similar.

The ramifications of the VW litigation on German legal culture have been staggering. The unprecedented volume of litigation has led to discussion about more staff at the court-houses; in particular, the court in Braunschweig, where Volkswagen AG has its headquarters, has hired six additional judges only to deal with VW cases.⁸³ The waves of VW litigation are also an economic boom for lawyers on both sides. In June 2019, a VW spokesperson said that up to that point, VW had spent already more than €1.7 billion on legal fees and other consulting expenses connected to the "clean diesel" scandal.⁸⁴ This figure apparently includes the U.S. litigation procedures, and it was not broken down for different countries. But a substantial part of this amount certainly was spent in Germany, where one of VW's law firms, Freshfields, hired dozens of new associates to deal only with VW consumer cases. Because

⁷⁹ LG Braunschweig, 30 April 2015, file no. 11 O 3092/19 (549).

⁸⁰ Oberlandesgericht Braunschweig, 19 February 2019, file no. 7 U 134/17.

⁸¹ See, e.g., Oberlandesgericht Koblenz, 12 June 2019, file no. 5 U 1318/18.

⁸² Bundesgerichtshof, 25 May 2020, VI ZR 252/19.

⁸³ "Braunschweig ist Spitzenreiter bei VW-Klagen," *NDR*, July 6, 2018.

⁸⁴ Volker, 2019.

the VW group consists of several legal entities—for example, the holding company Porsche SE and subsidiary companies, such as Audi AG—about 15 law firms were mandated for these entities to avoid possible conflicts of interest. There is almost no large commercial law firm in Germany today that does not in some respect deal with “clean diesel” cases. In 2017 and 2018, several German law firms reported record turnovers.⁸⁵ It is clear that the VW business contributed significantly toward these records. On the plaintiff side, many small law firms are involved, but there are also larger firms—Hausfeld, Quinn Emmanuel, and others.

In addition to this economic relevance for the legal services sector, there were the political consequences that led to the adoption of a new instrument of collective litigation, the *Musterfeststellungsklage* (model declaratory action). This is noteworthy because the VW scandal led the German legislature to at least partly retreat from its long-time opposition toward collective litigation and to open up the venerable Code of Civil Procedure for such a novel instrument.

Under the *Musterfeststellungsklage*, an action can be brought by certain *qualified entities*—in particular by government-financed consumer centers. The *Verbraucherzentrale Bundesverband eV* (VZBV; Federation of German Consumer Organisations) brought such an action against Volkswagen AG, suing the manufacturer under a tort theory similar to the myRight claims. The action was brought in November 2018, just after the new law came into force. More than 400,000 affected consumers declared that they were opting in to this action, which means that the declaratory result of the action would have been binding on these consumers. However, even if there had been a judgment in the *Musterfeststellungsklage*, individual actions would have been necessary to determine individual damages. This two-step system of the new instruments makes a settlement attractive in theory, but in practice it took time to achieve. The first hearing in the *Musterfeststellungsklage* was in September 2019, when VW still took the position that it had not done anything wrong. With regard to this argument, there was some irritation when current VW CEO Herbert Diess admitted in a talk show on German TV on June 18, 2019: “What we did was fraud.”⁸⁶ It was later explained by the company that this was not meant in a legal sense.

Immediately after New Year’s Day in 2020, VW started settlement talks with the VZBV, the plaintiff consumer organization, and pressed to quickly achieve a settlement. The tactical reason for this was the time slot between two dates: As of the end of 2019, it was widely agreed that all claims against VW were now time-barred, so that VW could be rather sure that no new claims would be brought if it started to admit wrongful behavior. On the other hand, VW wanted to finalize the settlement before May 5, 2020, the day on which the *Bundesgerichtshof* had scheduled the first oral hearing in an individual case. Although there was agreement on a payment scheme between the VZBV and VW, it turned out that the settlement approval procedure that was foreseen under the new law would have taken too long to fit into this time

⁸⁵ With regard to Freshfields, see, e.g., Helmut Bergmann, “Umsatz 2018: Freshfields-Kurve zeigt weiter nach oben,” *Juve*, July 5, 2019.

⁸⁶ Topgear Autoguide, “Herbert Diess: Legal Trouble After Appearance at Markus Lanz,” July 9, 2019.

slot, as it required that the court must approve the settlement and then serve it on the more than 400,000 customers. The service of the settlement then would trigger an opt-out period for each individual customer. Because the court did not have the necessary infrastructure in place, effecting service would have taken months, if not years.

Therefore, a unique agreement was made out of court between VW and the VZBV, under which VW created a settlement scheme website for individual customers who met certain requirements to enter into individual settlement agreements with VW until April 30, 2020, and receive individually calculated payments.⁸⁷ The payments varied from €1,350 to €6,257, depending on the car type and model year.⁸⁸ There was no buyback option, so that the customers had to keep their cars.

When the settlement plans became public in February 2020, they almost failed because of the fee demands on the plaintiff side. The legal situation regarding fees was very unclear, but the VZBV external counsel apparently demanded a handling fee for the execution of the agreement in the amount of about €100 or €150 per individual case. With more than 400,000 registered consumers, the counsel argued that a total sum of up to €50 million was suddenly possible. VW refused to pay such a sum. However, the president of the Higher Regional Court in Braunschweig, where the model declaratory action was pending, intervened and brought the parties back to the negotiation table. In the end, a compromise was found. VW agreed to pay the VSBV external counsel legal fees for the handling of the Musterfeststellungsklage in the amount of approximately €600,000. The compromise further involved the use of external auditors, as well as VW agreeing to cover fees for actual advice given to the individual consumers through a lawyer of their choice in the amount of up to €190 per case, but only if the consumer actually consulted with the lawyer and decided to enter into an individual settlement agreement.

Of the more than 400,000 registered consumers, VW and the VZBV agreed that only 260,000 would be eligible for payment. In particular, the agreement excluded consumers who resided outside Germany at the time they purchased their cars. The agreement also excluded those consumers who had bought the car after the end of 2015, and there were many duplicate or false registrations. As of June 2020, about 230,000 registered consumers had made individual settlements with VW and will receive the settlement payments. In the execution of the agreement with VW, the VZBV withdrew the model declaratory action on April 30, 2020.

The high participation rate shows that most eligible consumers accepted the proposed quick and final resolution, even if the payments may seem low in relation to what individual plaintiffs have received and might receive in the future after the plaintiff-friendly judgment from the Bundesgerichtshof. The model declaratory action has been a success both for VW and for the VZBV, the plaintiff organization: For VW, it has led to final resolution of a large

⁸⁷ Volkswagen AG, “Vergleichsportal geschlossen,” webpage, undated. The full text of the agreement can be found at Verbraucherzentrale, “Fragen & Antworten (FAQ) zum Vergleich gegen VW,” September 2, 2020.

⁸⁸ See the information provided by Verbraucherzentrale, “Vergleich zwischen vzbv und Volkswagen steht: Klage zurückgenommen,” September 7, 2020b.

number of cases, and the VZBV could show that it was able to bring such an action and achieve an acceptable result for many consumers.

Nevertheless, as of June 2020, the VW scandal is still only partly resolved in the German court system. The investors’ claims are completely unsolved, and, in the consumer area, many individual claims and the commercially aggregated actions are still pending. The issue of how to deal with foreign consumer plaintiffs is also open. In this respect, the local court in Braunschweig has recently ruled that the aggregation of claims by Swiss customers through a German commercial claims vehicle is illegal.⁸⁹

The Netherlands

Consumers in the European Union depend on a patchwork of collective redress mechanisms in their respective countries that, to date, have not been effective in securing compensation for either VW car owners or shareholders. Should a pan-European settlement be reached with VW, WCAM, the Netherlands’ unique settlement procedure described in Chapter Three, provides a mechanism by which the parties can formalize a compensation scheme and achieve finality. In fact, one foundation protecting the interests of investors has been established specifically and with the sole goal of facilitating a potential global settlement for VW shareholders.⁹⁰ However, its attempts to motivate VW to come to the negotiation table to explore the conclusion of a WCAM global settlement, without pursuing litigation, were unsuccessful; in June 2020, the foundation decided to dissolve. The chair of the foundation, a former high-profile Dutch judge, was quoted as explaining that the foundation was unable to achieve its goal due to the “weak European emission [control] rules.”⁹¹

The Netherlands has also taken some fairly robust regulatory action against VW domestically. In November 2017, the Netherlands Autoriteit Consument and Markt (Authority for Consumers and Markets) concluded its investigation of VW and imposed the maximum fine of €450,000. The administrative court of Rotterdam heard VW’s appeal of the fine in December 2019. In the European Union, only the Dutch and Italian regulators have taken measures against VW. Although the fines are modest, they send a signal about the view of some national authorities on the matter.

The Dutch authority also led the effort by national consumer authorities, under the auspices of the Consumer Protection Cooperation (CPC) network, to take coordinated enforcement action against VW. Among other initiatives, the CPC together with the European Commission sent a joint letter to the CEO of VW in the fall of 2017, demanding that the company provide detailed information to consumers about the nature of the repairs needed

⁸⁹ LG Braunschweig, decision of 30 April 2020, case no. 11 O 3092/19 (appeal pending).

⁹⁰ VW Investor Settlement Foundation, “Governance,” webpage, undated.

⁹¹ Huub Willems, “Nederlandse beleggersstichting haalt bakzijl bij Volkswagen en heft zichzelf op, by Heiko Jessayan,” University of Groningen, June 21, 2020.

on affected vehicles, effect those repairs promptly, and confirm that the repairs do not affect the performance of the vehicles.⁹²

On the civil litigation front, two initiatives are noteworthy. The first one was initiated under the old collective action regime that was in place since 1994 and allowed for nonprofit entities to ask for declaratory or injunctive relief.⁹³ The Stichting VW Car Claim, established in October 2015, acts for the benefit of approximately 160,000 Dutch car owners, including private, business, and car lease owners. In May 2018, the Stichting filed its claim against VW, Audi, Skoda, Seat, Bosch, the Dutch importer of the cars, and a number of VW dealers. The companies put forward several preliminary defense motions. They argued, for example, that the interests of the various categories of claimants were not sufficiently common or similar (also in view of the various defendants), that the subgroups of car owners supporting the action were not sufficiently large, and that the interests of the consumers were not sufficiently protected. When assessing the latter, the so-called self-regulatory manual *Claimcode*, which lays out governance requirements for ad hoc established foundations, is a factor to be taken into account. In an interim ruling of November 20, 2019, the Amsterdam District Court rejected the majority of the motions. It decided that the collective action should proceed with respect to the majority of the claims of the private and business car owners. The defendants were given the opportunity to file substantive defense motions, and a hearing was scheduled to take place in May 2020. The latter has been rescheduled in view of the coronavirus pandemic.

The second initiative was filed under the new collective action regime that came into force on January 1, 2020. On March 20, 2020, the Stichting Diesel Emissions Justice, established on July 3, 2019, filed a claim with the Amsterdam District Court on behalf of all private, business, and car lease owners domiciled in the European Union who had not been compensated to date. Other foundations that would like to compete for the appointment of exclusive representative could submit a statement of claim up to the end of June. The same foundation filed a second claim under the new law based on similar allegations against Daimler AG and

⁹² European Commission, “Common Position of National Authorities Within the CPC Network,” undated.

⁹³ Ianika Tzankova, “Everything You Wanted to Know About Dutch Foundations but Never Dared to Ask: A Check List for Investors,” *Zeitschrift für Verbraucherrecht*, February 10, 2016.

Dutch Mercedes-Benz entities in June 2020,⁹⁴ and in December 2020 two more foundations filed similar claims.⁹⁵

Brazil

The “clean diesel” scandal reached Brazil in 2015. Once the news broke in other parts of the world about the impact of VW’s deceitful conduct regarding the software installed in

⁹⁴ Litigation has been brought in other European jurisdictions in varying forms and with varying degrees of success. In the UK, VW faces 91,000 consumer claims under a group litigation order. The High Court of England and Wales (EWHC) in London issued an interim judgment on April 6, 2020, ruling that VW had fitted its diesel cars with “defeat device” software that circumvented emission testing. Justice Waksman also concluded that VW’s attempt to relitigate the issue in the UK, after Germany’s Federal Motor Transport Authority had already determined that the software constituted a defeat device, amounted to an abuse of process. *Crossley & ORS v Volkswagen et al* [2019] EWHC 783(QB). The High Court has yet to rule on the issue of liability and whether damages are owed to the 91,000 members of the group; see “UK Drivers Win First Round in VW ‘Dieselgate’ Case,” BBC News, April 6, 2020.

The Klagenfurt Regional Court in Austria asked the European Court of Justice (ECJ) for a ruling interpreting European law on the right of VKI—an Austrian consumer association—to file suit against VW. The ECJ issued a preliminary ruling interpreting Article 7(2) of Regulation (EU) No 1215/2012 of the European Union to provide jurisdiction for courts in the European Union to hear claims against VW from car buyers outside Germany. The advocate general for the ECJ thus concluded with regard to the Austrian consumers that, while the defeat devices were fitted in VW’s plant in Germany, the harm to car buyers was suffered in Austria, with the result that courts in both countries have jurisdiction under European Union law. However, this opinion is advisory, and there will not be a final decision for a number of months; see Sara Lewis, “Volkswagen Could Face More Dieselgate Fallout,” *WardsAuto*, April 15, 2020.

In Italy, the consumer group Altroconsumo filed a class action against VW in a Venice court in May 2017, and it was accepted; see “Italy Court to Take on Consumer Group Action Against VW,” Reuters, May 25, 2017. This litigation is ongoing and appears to be delayed partly because of criminal proceedings that are being brought against the Italian leaders of VW; see Federico Formica, “Dieselgate, chiesta l’archiviazione per i vertici di Volkswagen Italia,” *La Repubblica*, April 20, 2020.

In France, the Diesel Emissions Justice Foundation, a Dutch foundation backed by the French consumer association Familles rurales and the environmental group France nature environnement, is seeking to negotiate with VW to compensate French citizens who suffered losses; see Diesel Emissions Justice Foundation, “News,” webpage, undated; “VW Faces ‘Dieselgate’ Lethal Threat in France,” *The Connexion*, January 27, 2020; “Dieselgate: Participez à l’action collective!” Familles rurales, January 23, 2020.

The Diesel Emissions Justice Foundation filed a collective action in the Netherlands on behalf of both Dutch and non-Dutch owners and on January 23, 2020, announced a separate collective action in France. Diesel Emissions Justice Foundation, “Dieselgate: La Fondation Diesel Emissions Justice annonce une action collective contre Volkswagen,” press release, January 23, 2020.

In June 2016, a Belgian consumer group commenced a collective action on behalf of approximately 11,000 Belgian car owners. The Brussels Civil Court declared the action admissible on an opt-out basis in December 2017. The negotiation phase has been completed, and the case is scheduled for trial in February 2022; see Félix Bouland, “10.000 Belgian Owners Join Class Action Against Volkswagen,” *Newmobility.news*, June 19, 2019.

In Ireland, several individual suits have been brought against VW, but progress has been slow and negligible. Currently, class actions are not a procedural vehicle available to potential claimants in Ireland.

⁹⁵ Personal report by Professor Ianika Tzankova.

its diesel-powered vehicles, it did not take long for the Brazilian authorities and consumer protection advocates to jump on the bandwagon to hold the carmaker liable. Similar to what occurred with affiliates of the VW conglomerate in other jurisdictions, Volkswagen do Brasil Ltda (VW Brazil) faced actions on at least two fronts. The first one involved administrative proceedings before federal and state government agencies. The federal agencies involved were the Department for Consumer Defense and Protection of the Ministry of Justice and Public Safety and the Brazilian Institute for the Environment and Renewable Natural Resources. The state-level agency was the Fundação Procon–São Paulo, an organ of the Secretary of Justice and Citizen Defense of the State of São Paulo.⁹⁶ The second front was the public civil action (*ação civil pública*) filed in October 2015 by the Associação Brasileira de Defesa do Consumidor e Trabalhador (ABRADECONT; Brazilian Association of Consumer and Worker Protection) before the commercial court of Rio de Janeiro, on the basis of the violation of the CDC, especially the provisions regarding the right of consumers to receive clear and adequate information about products and services offered in the market (article 6, II, IV CDC), and the right of consumers to obtain redress for any injury caused by the illegal conduct of a manufacturer, distributor, or seller. Plaintiffs justified the filing of a collective action because the same alleged harmful conduct attributed to VW Brazil affected a large group of identifiable victims.

Considering that Brazil’s automobile market is one of the largest in the world, and the millions of vehicles that VW admitted to being faulty globally, the fact that only 17,057 Brazilian units were affected indicates that these claims were miniscule in relation to the global landscape of the “clean diesel” affair. Curiously, one of the reasons why Brazil was barely affected by this scandal is because diesel propulsion is permitted only in commercial vehicles and not in passenger cars.⁹⁷ In fact, for years most Brazilian automobiles have been fueled by ethanol, which is arguably less polluting than other fuels. The only vehicle that qualified for the litigation was the Argentine-manufactured pickup Amarok equipped with the 2.0 TDI diesel engine (turbo-charged direct injection diesel engine). Notwithstanding the relatively small size of the Brazilian plaintiff class vis-à-vis the millions of victims from other jurisdictions, the ABRADECONT litigation became symbolically important for consumer protection advocates in Brazil and strategically important to the multinational company. As a result, the media coverage and the attention garnered by both the litigation and administrative proceedings in legal and corporate circles was notable.

To this day, the total amount of pecuniary sanctions levied on VW Brazil by three government agencies (two federal and one from the state of São Paulo) surpasses R\$65 million (approximately US\$12 million to June 2020).⁹⁸ The first and largest one, for R\$50 million

⁹⁶ Diário Oficial, Poder Executivo—Seção I, São Paulo: Imprensa Oficial, Vol. 129, No. 84, 2019, pp. 37–38.

⁹⁷ Giorgio Pedrazzi, “Civil and Consumer Law,” in Marco Frigessi di Rattalma, ed., *The Dieselpgate: A Legal Perspective*, New York: Springer, 2017.

⁹⁸ Carlo Cauti, “Volkswagen deve R\$65,5 mi em multas no Brasil por Dieselpgate,” *Suno Notícias*, February 6, 2019.

(about US\$9 million), resulted from a proceeding decided in late 2015,⁹⁹ and confirmed in March 2017,¹⁰⁰ which found the company in violation of an array of legal provisions regarding environmental pollution in Brazil.¹⁰¹ The second fine, in the amount of R\$8,333,927.79 (about US\$1.5 million) was imposed by Fundação Procon–São Paulo, also in 2015, for the violation of articles 39(VIII) and 37(III) CDC.¹⁰² The latest fine, for R\$7.2 million (about US\$1.3 million), was ordered by the Brazilian Department of Consumer Defense and Protection in 2019, as a result of a proceeding that started three years earlier.¹⁰³

The complaint filed as a public action by the consumer association, ABRADECONT, sought (1) a court order compelling VW Brazil to provide detailed information about the existence of a defeat device in the Amarok vehicles sold in Brazil, (2) the payment of both compensatory and moral damages to the owners of the Amarok vehicles, (3) the payment of collective moral damages to the National Fund for Consumer Defense, and (4) the recovery of legal fees and court costs. The complaint described in great detail the global dimensions of the “clean diesel” scandals, especially the developments that occurred in the United States and Europe, and asked the court to consider those circumstances when deciding the Brazilian action. Unsurprisingly, the defendant challenged any attempt by the plaintiffs to connect the Brazilian situation to what occurred in other countries. In its answer to the complaint, VW Brazil argued that the software had not been activated in the vehicles sold in Brazil. Other challenges were directed to the standing (or lack thereof) of ABRADECONT to file the collective action and to the adequacy of the remedies sought.

On September 13, 2017, the First Instance Court found for the plaintiffs and ordered VW Brazil to pay R\$64,000 (about US\$11,500) to each consumer (R\$54,000 [about US\$9,700] for material damages and R\$10,000 [about US\$1,800] for moral damages), as well as R\$1 million (US\$180,000) in collective moral damages to be paid to the National Fund for Consumer Defense. Additionally, the court ordered the defendant company to pay legal costs and fees for an amount equivalent to 10 percent of the judgment and ordered it to also provide detailed information about all the possible defects affecting the vehicles sold by VW Brazil. VW Brazil filed an appeal, which was subsequently denied. The case is yet to become final, as the losing

⁹⁹ Brazilian Institute of the Environment and Renewable Natural Resources, “Ibama multa Volkswagen do Brasil em R\$50 milhões por fraude,” November 12, 2015.

¹⁰⁰ Brazilian Institute of the Environment and Renewable Natural Resources, “Ibama confirma multa de R\$50 milhões por fraude em testes de emissão e exige recall da Volkswagen,” March 24, 2017.

¹⁰¹ Brazilian Institute of the Environment and Renewable Natural Resources, *Decisão Administrativa Eletrônica de 1ª Instância—Auto de Infração*, No. 191/2017-SEDE/NUIP, No. Processo 02001.007032/2015-46, 2017.

¹⁰² Fundação Procon–São Paulo, “Empresa utilizou software que mascara emissões de gases na Amarok,” November 15, 2015.

¹⁰³ G1, “Volkswagen é multada em R\$ 7,2 milhões no Brasil pelo ‘Dieselgate,’” *Auto Esporte*, February 5, 2020.

party still has the right to seek review with the Superior Court of Justice (Superior Tribunal de Justiça) and to the Supreme Court of Justice (Supremo Tribunal Federal).

Chile

The global impact of the “clean diesel” scandal did not take long to reach Chile. On September 28, 2015, the Centro de Control y Certificación Vehicular (3CV; Vehicle Certification and Control Center), an agency of the Ministry of Transport and Telecommunications, requested Porsche Chile S.p.A., a subsidiary of Volkswagen AG responsible for the importation and commercialization of VW, Audi, and Skoda vehicles, to provide information about which vehicles might be affected by emission issues. Upon receiving a list of 4,997 vehicles from Porsche Chile, 3CV denied the issuance of a compliance certificate, which prevented those vehicles from being sold.

A year later, on September 26, 2016, Chile’s SERNAC invited Porsche Chile to participate in a collective mediation, which resulted in a settlement agreement finalized on August 10, 2018.¹⁰⁴ Pursuant to this settlement, Porsche Chile agreed to (1) update the engine control unit of the 4,997 vehicles imported into Chile, (2) offer a small voucher in the amount of 18,000 CLP (Chilean pesos; about US\$22 in June 2020), and (3) offer a free ten-point inspection of each vehicle. The settlement agreement also included a report every six months to SERNAC and an external audit at the end of the remediation period.

Notwithstanding the settlement reached between Porsche Chile and SERNAC, on November 6, 2018, a judicial complaint was filed by the Organización de Consumidores y Usuarios de Chile, A.C. (ODECU; Organization of Consumers and Users of Chile)—a private consumer protection association—both on behalf of a group of vehicle owners and to protect the diffuse interest of all citizens affected by the pollution resulting from any illegal emissions caused by foreign vehicles manufactured by Porsche, VW, Audi, and Skoda and imported into Chile between 2006 and 2016.¹⁰⁵ ODECU is a well-established consumer association created in 1994,¹⁰⁶ and it is registered to file actions under article 50(2) of the Consumer Protection Statute (CPS; Ley de Protección de los Derechos de los Consumidores). The complaint listed Porsche Chile and Comercializadora Ditec Automoviles, S.A. (Ditec) as codefendants.

The complaint was grounded on several CPS provisions and contained two types of actions: a collective interest action and a diffuse interest action. As a collective action, the complaint sought redress for those who purchased vehicles manufactured abroad and imported into Chile by Porsche, VW, Skoda, and Audi and equipped with software that deceived the authorities and the owners regarding emissions. Regarding the number of vic-

¹⁰⁴ Acuerdo de Mediación Colectiva, contenido en el ORD. No 014888 del SERNAC, August 10, 2018.

¹⁰⁵ Organización de Consumidores y Usuarios de Chile v. Porsche Chile, complaint, 4th J. Civ. Santiago, C-34570-2018, November 16, 2018.

¹⁰⁶ Organización de Consumidores y Usuarios de Chile, “Quiénes Somos,” webpage, undated.

tims, the complaint mentioned an initial estimate of about 5,000, which corresponded to the number of vehicles reported by Porsche Chile to 3CV, as indicated earlier. Nevertheless, the complaint stressed that the group of affected individuals could grow substantially, if the same defect were to be discovered in other vehicles sold by the codefendants in Chile. As a collective action, the complaint sought a court order that gave consumers the option of having their vehicles repaired in compliance with the emission standards, selling their vehicles back to the company, or receiving a single payment of CLP 6.5 million (about US\$8,000 in June 2020) and other damages. As a diffuse interest action, the complaint sought remedies to protect all citizens affected by the pollution caused by the excessive emissions (more than 40 times the legally permitted limit) and their contribution to cardiovascular and respiratory ailments affecting the population. The complaint did not list a separate prayer for relief regarding the diffuse interests, other than to order the companies to repair, recall, or compensate for any harms inflicted as a result of the corporate misconduct.

The complaint described in detail how the VW emissions scandal gave rise to a flurry of legal actions in the United States, Germany, Australia, and other countries. It also made reference to an investigative report made in Chile by a local television network (Canal 13) with the assistance of experts from two universities.¹⁰⁷ The report revealed that one of the vehicles, the Skoda Fabia, emitted 6.6 times more NOx than the legal limit in Chile, and its pollution level was 9.2 times higher than the vehicle’s own certification. Regarding the United States, the complaint specifically mentioned the criminal action filed against Oliver Schmidt, VW’s head of the U.S. Environmental and Engineering Office, in the Eastern District of Michigan in late 2016.¹⁰⁸ The complaint also referenced U.S. congressional hearings during which the company’s CEO apologized for its practices, the MDL proceedings, and the settlements reached in the United States. The Chilean plaintiffs considered the U.S. settlement a particularly important reference because it mentioned models of vehicles that, despite being sold in Chile, had not been included in the original list published by the codefendants. Furthermore, the complaint expressly indicated that the remedies it sought were “of similar characteristics” to those requested by U.S. plaintiffs in American courts,¹⁰⁹ therefore asking the Chilean judge to look beyond the country’s borders for guidance when deciding the case.

Regarding the legal grounds, the complaint alleged that the codefendants had (1) failed to adequately inform the consumers about the real specifications of the vehicles, especially regarding emissions (article 1[3] CPS); (2) failed to respect the terms, conditions, and characteristics of the vehicles sold (article 12 CPS); (3) failed to inform the consumers about the defects (article 14 CPS); (4) sold harmful products to consumers (article 23[1] CPS); (5) engaged in deceitful advertisement (articles 1[4] and 28 CPS); (6) failed to inform the authorities about

¹⁰⁷ “Reportaje Canal 13: Dieselgate; El escándalo automotriz en Chile,” T13, September 9, 2018.

¹⁰⁸ Volkswagen Diesel Engine Vehicle Matters, 16-cr-20394, U.S. District Court for the Eastern District of Michigan (see U.S. Department of Justice, “Pending Criminal Division Cases: Volkswagen Diesel Engine Vehicle Matters,” webpage, last updated December 18, 2018).

¹⁰⁹ Complaint at 17.

the existence of a harmful product (article 46 CPS); and (7) violated the constitutional right to health that the constitution guarantees to every person (article 19[8,9] Constitution of Chile).

In their answer to the complaint, the codefendants rejected all references that connected the vehicles commercialized in Chile with those sold elsewhere and stressed that the judicial developments, outcomes, and sanctions in the United States and other countries were not applicable to Chile. The codefendants also challenged the standing of ODECU to bring an action on behalf of those who purchased their vehicles from independent dealers and from previous owners and, finally, challenged the possibility of finding in favor of the plaintiffs regarding the protection of diffuse interests. In the specific case of Ditec, it argued that it was wrongfully included in the complaint because it had no relationship with VW and that Ditec's vehicles were different from those affected.

In September 2019, the parties requested that the court suspend the proceedings so they could enter into settlement negotiations. After several months, on January 16, 2020, they reached an agreement. Under the settlement agreement, Ditec and Porsche Chile agreed to provide consumers the necessary updates and software modifications and install them in the affected vehicles. They also agreed to pay each affected consumer US\$500, through a special administrator appointed to that end. The codefendants also agreed to donate US\$187,500 to the charitable organization Fundación las Rosas and an equal sum to the Universidad San Sebastián, plus any unclaimed amounts held by the special administrator after one year of the settlement agreement. Finally, the codefendants agreed to reimburse all legal costs incurred by ODECU. After the settlement was entered in court and publicized so that any interested third parties could object to any of its terms, and since no objection was filed, it finally acquired *res judicata* effect on May 13, 2020.

Summary of VW Litigation Progress and Outcomes in Seven Jurisdictions

At the time of the 2019 roundtable at Stanford, the U.S. litigation and Canadian litigation were largely concluded, but litigation was still in progress in the five other jurisdictions on which we report here. One year later, the consumer litigation had essentially concluded in all but one jurisdiction, while the shareholder litigation continued in Germany. Table 4.1 summarizes the status of the litigation as of about June 2020. Notwithstanding differences in environmental regulations that arguably determined VW's liability for adjusting its engine management software (i.e., installing a "defeat device"), other differences in substantive law, whether remediation was available at the time the litigation commenced, and the distinctive features of the aggregate and collective procedures that claimants made use of, consumers recovered in all of the jurisdictions, with the exception of the Netherlands, where consumer litigation began substantially later than in other jurisdictions. Shareholder litigation was still in progress.

TABLE 4.1
Summary of Outcomes of Litigation in Seven Jurisdictions

| Jurisdiction | How Resolved? | Average Compensation, to Whom? | Regulatory Penalties | Criminal Sanctions |
|----------------|--|---|--|--|
| United States | Multiple class action settlements, plus criminal prosecutions | Average US\$18,000 value per consumer in buybacks and direct payments; a total of US\$9.5 billion value to approximately 537,000 consumers | US\$2.9 billion to Environmental Trust Fund; US\$443.5 million in civil UDAP penalties; US\$157 million in civil environmental penalties | US\$2.8 billion in fines, plus indictments of executives |
| Canada | Multiple national class action settlements (varying by model of car) on behalf of car owners; securities class action dismissed; ongoing environmental class action on behalf of residents of Quebec | Owners/lessees entitled to C\$5,000–\$8,000, plus choice to sell or trade in the vehicle, terminate the lease without penalty, or keep the vehicle and get an emission modification and an extended emission warranty | C\$196.5 million in fines to Canadian Environmental Protection Agency; C\$17.5 million in fines to Competition Bureau | None |
| Australia | Settlement of five consumer class actions, plus regulatory proceedings | Average settlement of A\$2,800, with precise amount varying by type and age of vehicle, ranging from approximately A\$1,589 to A\$6,554; total settlement A\$124 million, paid to 44,000 class members who registered timely claims | Civil penalty of A\$125 million in proceedings brought by the ACCC | None |
| Germany—KapMuG | KapMuG cases still pending versus Volkswagen AG and Porsche SE | None as of now | None | Herbert Diess and Hans Dieter Pötsch fined €4.5 million each |

Table 4.1—Continued

| Jurisdiction | How Resolved? | Average Compensation, to Whom? | Regulatory Penalties | Criminal Sanctions |
|---|--|---|--|--|
| Germany—model declaratory action (Musterfeststellungsklage) | Out-of-court settlement with 240,000 German consumers | Average payment of €3,000 | VW: €1.0 billion to state of Niedersachsen; Audi: €0.8 billion to state of Bavaria | Criminal trial against Martin Winterkorn still pending |
| Netherlands | Multiple class actions ongoing (under pre-2020 statute for Dutch consumers only; under 2020 statute, for all European Union consumers) | None as of now | €450,000 (November 2017) | None |
| Brazil | Judgment in public action filed by consumer association, confirmed by Court of Appeals, but still pending review by higher courts | R\$64,000 (US\$11,500) per consumer for material and moral damages, plus R\$1 million (US\$180,000) in collective moral damages to the National Fund for Consumer Defense | R\$65 million (US\$12 million) in fines by various public regulators | None |
| Chile | 2018 mediated settlement between Porsche Chile and Chilean Consumer Agency; 2020 settlement of collective and diffuse interest actions filed by consumer association | US\$500 per consumer, plus updated, modified software installation in each car, plus US\$187,500 each to a public charitable organization and the University of San Sebastian | None | None |

Lessons from the Volkswagen “Clean Diesel” Litigation

Although the litigation against VW and its subsidiaries arising out of the “clean diesel” scandal has wound down in many jurisdictions, it continues in others. As described in this report, in some jurisdictions, owners of the affected vehicles were compensated handsomely, and civil penalties and criminal indictments were also imposed. In other jurisdictions, compensatory payments were modest, and resolution instead focused on remediation. Remarkably, however, although environmental regulations vary among jurisdictions and substantive and procedural law differ in important respects, in every jurisdiction that we have studied to date, individual consumers, nonprofit associations, and public regulators successfully used the courts to secure some benefit from or penalty against VW for the company’s behavior. In this chapter, we highlight what we have learned from the litigation, drawing on the discussion of the 2019 roundtable at Stanford.¹

Lesson 1: The global mass VW litigation is not a “one-off”

Kenneth Feinberg, the special master who designed and administered the U.S. September 11th Victim Compensation Fund, has spoken in many domestic and international venues about the challenges of addressing victims’ claims for compensation when mass injuries or losses occur as a result of events outside the victims’ control. In the early years after the successful conclusion of the fund, Feinberg would caution his audience that although his experiences might be of interest, the program he designed was a one-off. “It will never happen again,” he would say. Although thankfully there has been no attack resembling the terrorists’ attacks on the World Trade Center and Pentagon since, there have been numerous times when Feinberg has been called in to design a special compensation program for claimants

¹ To encourage candid discussion, the roundtable was not recorded. Notes from the discussion (provided by student notetakers and some individual participants) reveal a rich conversation, replete with statements about the participants’ experiences and attitudes toward various aspects of global civil litigation. Certain themes recurred during the day without moving toward any sort of resolution or consensus. In accordance with our agreement with participants, we have followed Chatham House rules, meaning that we refer to statements made at the roundtable without attribution.

when catastrophic events or corporate wrongdoing led to mass injuries or financial loss and, subsequently, mass claims for compensation.² Not surprisingly, then, VW called him in when it became obvious that the company would face massive litigation over the “clean diesel” scandal. The global consumer and securities litigation that erupted after the revelation that certain VW vehicles contained software intended to mislead emission monitoring equipment is unusual in size, geographic scope, and expense. Yet none of the participants in the roundtable argued that we will never see its like again. Indeed, it was the thought that something similar *is* likely to occur again—albeit with a different set of facts, claimants, and potentially liable defendants—that brought the roundtable participants together and engendered the lively discussion that took place in April 2019.

Lesson 2: On the surface, the VW litigation suggests that procedures for addressing global mass civil claims are converging

Importantly, all the jurisdictions represented at the workshop have some sort of aggregate or collective procedures that have been put to use to resolve all or portions of the civil litigation. In Germany, where no collective procedure for consumer claims existed prior to news of the “clean diesel” scandal, the legislature adopted a new “model proceeding” in response to pressure from consumer associations and individual consumers. In other jurisdictions, where existing aggregate and collective procedures had been used sparingly before the uproar over “clean diesel,” the courts seemed loath to deny consumers and their advocates permission to use the procedures to obtain declaratory relief, money damages, and remediation.

Generally, judges assigned to manage the VW litigation in civil law and common law regimes have been more proactive in managing the cases than many of them are accustomed to being when assigned to conventional civil litigation. Experience suggests that, over time, judges who have successfully adopted new strategies for managing previous mass civil claims will be likely to use these strategies again when faced with such claims. In other meetings, this report’s coauthors have found judges in their own national jurisdictions eager to learn from judges in other jurisdictions about how they manage large-scale multiparty civil litigation.

In the VW litigation, plaintiff attorneys coordinated strategy across national boundaries, and some judges paid attention to the progress of cases in other jurisdictions, including other judges’ decisions, even though those cases and decisions had no formal significance within

² See, e.g., Terry Carter, “Master of Disasters: Is Ken Feinberg Changing the Course of Mass Tort Resolution?” *ABA Journal*, January 1, 2011; Ross Barkan, “Meet Ken Feinberg, the Master of Disasters,” *Observer*, March 9, 2016; Ellen Potilove, “Kenneth Feinberg Master of Disaster Discusses Victim Compensation Funds with Oasis,” Johns Hopkins University, Montgomery County, March 6, 2018; Sarah Randazzo and Micah Maidenberg, “Boeing Hires Kenneth Feinberg to Handle 737 MAX Claims,” *Wall Street Journal*, July 17, 2019.

their own jurisdiction. In Brazil and Chile, as detailed above, plaintiffs included lengthy descriptions of the U.S. litigation against VW, as well as congressional investigations, including facts uncovered in those proceedings. (Not surprisingly, VW objected to the proposition that those courts should pay attention to decisions elsewhere, rather than strictly adhering to domestic law and proceedings.) It seems likely that cross-jurisdiction communication and informal coordination among lawyers and parties, if not, perhaps, judges, will lead to increasing similarity among procedural rules and possibly even substantive laws.

Lesson 3: On closer look, however, the VW litigation illustrates that national approaches to mass civil litigation continue to be quite distinctive

For example, as shown in Table 3.1, aggregate and collective procedures differ significantly across jurisdictions. Moreover, cost rules differ in significant ways, with an enormous effect on who can sue, how likely those who sue are to prevail, and what ratio of their losses they are likely to recover if they prevail. Acceptance of third-party litigation funding, which has arisen as a result of restrictive cost rules, varies substantially, with ongoing efforts to strictly restrict it in some jurisdictions (e.g., Germany, the United States) and initiatives to permit but regulate it by judicial oversight (e.g., Canada) or statutory requirements (e.g., Australia) in others. In addition, some jurisdictions (e.g., the Netherlands) require that the nonprofit representative entities undertake extensive and costly efforts to recruit claimants (so-called book building) to demonstrate their representativeness and to proactively communicate with that group about its efforts and achievements throughout the litigation. Such efforts may also be required to attract third-party funding. Arguably, such recruitment efforts increase the transparency and governance of representative entities, but they also add another layer of costs and complexity.

Differences between jurisdictions in claimant recruitment practices influence claiming rates, funding, and outcomes in ways that are not always appreciated by national courts and practitioners who are not engaged in collective litigation. A systematic empirical analysis of the relationship between policies regarding third-party funding and claiming rates and outcomes has yet to be conducted, and the appropriateness of such funding remains a subject of vigorous debate in the jurisdictions represented at the roundtable.

Only some jurisdictions have statutory rules for coordinating and centralizing multiple lawsuits that arise from the same factual circumstances within domestic jurisdictions, a key characteristic of mass claims. The absence of such procedures challenges courts and judges in other jurisdictions to manage mass litigation efficiently and economically. But prioritizing some lawsuits over others and selecting lawyers to lead the litigation are inconsistent with the traditional view of the proper role of civil court judges in those jurisdictions. And no one at the 2019 roundtable proposed creating a formal mechanism for coordinating global litigation across jurisdictional boundaries.

Rules regarding the production and admissibility of evidence (especially documents) differ dramatically (with the U.S. discovery as the example of ease of obtaining documents and Germany as an example of the opposite). Adoption of “U.S.-style” discovery rules is fiercely resisted in many jurisdictions outside the United States.

Finally, the availability of monetary damages differs significantly among jurisdictions, both in group or collective procedures and more generally (e.g., punitive or exemplary damages, treble damages).

Among all these differences, the one that received the most attention from roundtable participants, who returned to it repeatedly during the day, is the contrast between the ease of obtaining evidence under U.S. discovery rules and restrictions on obtaining what is often equivalent information in global litigation under German and other civil law rules. On the one hand, to a layperson, the idea that information that is relevant to a global litigation arising out of the same factual circumstances may be admitted in some jurisdictions but not in others seems illogical. On the other, some roundtable participants argued forcefully that national jurisdictions’ rules for obtaining evidence are part of a carefully calibrated set of procedural and evidentiary rules, intended by legal policymakers to balance claimant, defendant, and public interests.

Roundtable participants argued that many of the differences they identified are deeply rooted in domestic legal cultures and therefore unlikely to change quickly, if ever. However, just what *legal culture* means was not an issue that participants explored. Hence, it is possible that *different legal cultures* functions as code for a strong desire to adhere to traditional legal rules, even in the presence of changing demands on the legal system. What constitutes legal culture, how it differs across national jurisdictions, and how it impedes or facilitates the responsiveness of legal systems to changing economic and social demands as reflected by global mass civil litigation might be a good subject for a future roundtable.

Lesson 4: Victims of the same event or wrongdoing in different countries seem increasingly to believe that they deserve the same compensation that victims in other countries have received, without regard to differences in substantive law or regulations

This phenomenon, which on the surface contradicts the notion of sharp national differences in legal culture, is driven by the availability of information about events outside one’s own country via mass and social media. The VW litigation vividly illustrated this development. Although environmental regulations regarding NOx emissions differ by country, “clean diesel” purchasers worldwide seemed to expect that they deserved the same compensation that U.S. consumers received for violations of strict U.S. regulations, which received extensive coverage internationally. This effect was amplified by the fact that the U.S. class

action moved forward and reached resolution while litigation elsewhere was in progress or just beginning. Moreover, because there were so many owners of these vehicles in each country—a mark of VW’s marketing success—the pressure on political leaders to respond to consumer expectations was enormous. At the time of the roundtable, VW was still vigorously defending its behavior in Germany, Australia, and other parts of the world. As described in the report, the company ultimately accepted the practical need to resolve consumer claims in these jurisdictions, albeit not with the same level of compensation that was provided to U.S. consumers. As another example of the effect of outcomes elsewhere, in Brazil and Chile, lawyers presented judges presiding over VW cases with information about the progress and outcomes of the litigation in the United States, clearly hoping that this information would influence those judges’ decisions.

Lesson 5: The VW litigation teaches us that global litigation has the potential to affect not just the outcomes of parallel domestic lawsuits but the procedural rules and substantive law that shape this litigation

The success of the U.S. consumer class action propelled Germany, which had long resisted adopting a collective litigation procedure for consumer claims, to implement a new model declaratory procedure to facilitate such claims. Moreover, after more than a decade of debate and discord, on November 25, 2020, the European Union Parliament and Council adopted the Directive on Representative Actions for the protection of the collective interests of consumers, which requires every member state to establish a representative collective litigation procedure for damages in cross-border and domestic claims arising out of consumer protection law—both “general consumer law” and claims involving “data protection, financial services, travel and tourism, energy and telecommunications.”³ Many commentators agree that the “clean diesel” scandal forced the German government, which had long been one of the main opponents of providing a more effective collective procedure to protect consumer rights at the European Union level, to abandon that opposition, which—post-“clean diesel”—was seen as driven by the government’s interest in protecting its own industry.

³ See European Union, “Directive (EU) 2020/1828 of the European Parliament and of the Council,” November 25, 2020, for representative actions for the protection of the collective interests of consumers. On the scope of the directive, see para. 13. The new directive repeals and replaces the 2009 directive allowing “qualified entities” to bring representative actions on behalf of consumer interests, which was deemed not to “sufficiently address the challenges relating to the enforcement of consumer law.” See para. 9.

Lesson 6: Whatever the jurisdiction, when there are serious allegations of wrongdoing that affect large fractions of domestic populations, criminal and regulatory actions are likely to ensue

Sometimes these public investigations precede civil actions; sometimes they follow. Inevitably, they complicate civil litigation. When public officials determine that wrongdoing has occurred and sanction that behavior, it may significantly increase the value of legal claims.

Public officials increasingly communicate (and sometimes coordinate) with each other, working across national boundaries just as private plaintiff and defense counsel do. Public regulators may also coordinate and cooperate with lawyers for claimants and defendants. Notwithstanding long-running scholarly and public policy arguments about the proper roles for public versus private enforcement, on the ground, the lines between public and private enforcement are increasingly blurred.

Mass media reports on criminal prosecutorial and regulatory activity taking place in some jurisdictions may create pressure for public officials to take more-assertive action in other jurisdictions than they would otherwise be inclined to take. Where particular industries or products require regulatory approval or are subject to regulatory oversight, regulators often have extensive coercive, fact-finding, and persuasive powers to facilitate remedies for those who suffer loss. Some roundtable participants suggested that, in the future, regulators might be more inclined to use these powers to press wrongdoers to “voluntarily” offer to remediate harms rather than to rely wholly on private enforcement by consumers or shareholders to obtain compensation for loss or damages.

Lesson 7: Parallel litigation in domestic courts arising out of the same circumstances feeds desires for transnational information sharing

Notwithstanding sharing of information among plaintiff and defense counsel, public regulators, and nongovernmental organization representatives, judges are often not well informed about the progress and outcomes of litigation outside their own jurisdictions, and factual information made available to courts in one jurisdiction may be deemed inadmissible in another. From a formal law perspective, this is not surprising: Domestic judges are supposed to decide domestic disputes according to domestic law. Yet judges at the roundtable were eager to discuss mechanisms to facilitate information sharing, and some even proposed sharing at least some documents, expert reports, and other relevant factual information across jurisdictions, arguing that this would reduce expense and delay in global litigation. To foreign defense counsel, opening up their court proceedings to “U.S.-style discovery” was anathema. And some were wary of sharing even more-general information among judges, as it

might push their jurisdictions toward new rules and norms that these lawyers do not believe are in the interests of those they typically represent.

Whether parallel litigation information ought to be shareable across jurisdictions and, if so, what types of information and with what restrictions are worthy topics for future study and debate. The experience of the VW litigation, in which parties in some jurisdictions devoted substantial expense to battles over the admissibility of information that had been admitted in other jurisdictions and was known to the parties, and in which advocates clamored for outcomes to match outcomes in other jurisdictions, suggests that there will be pressure going forward to consider new mechanisms for information sharing in global litigation. The appetite for transborder information sharing that was expressed by some roundtable participants, however, was not matched by calls for coordination of decisionmaking: No one proposed a new international court for global litigation or an international version of the U.S. MDL that collects cases for pretrial management.⁴

Lesson 8: In response to cost-shifting and lawyer fee rules, third-party funding has arisen as a near-essential ingredient to facilitate aggregate and collective litigation in many jurisdictions

Money is the lifeblood of global litigation, as it is of all domestic civil litigation. As indicated in Table 4.1, the costs of aggregate and collective litigation in the jurisdictions represented at the roundtable have been paid, variously, by the public (in instances in which standing to represent claimants is accorded public officials); by public funds established to facilitate private collective litigation; by class members, associations certified to represent claimants in collective litigation, and special foundations, which contract with private attorneys; and by third-party funders. Financing of litigation by third parties is spurred by cost-shifting rules that impose adverse cost risks on parties and by prohibitions on contingency fees, which in the United States and some other jurisdictions shift expense and risk to private attorneys. Third-party funding is controversial in many jurisdictions but has increasingly been accepted as a means of facilitating access to courts for litigants, especially in mass claims in which each claimant’s stake in the litigation is too modest to sustain individually retaining counsel on an hour and expense basis and cost shifting and limitations on lawyer contingency fees prevail.

⁴ See, e.g., Maya Steinitz, *The Case for an International Court of Civil Justice*, Cambridge, UK: Cambridge University Press, 2018.

Lesson 9: In the long run, global mass civil litigation is more likely to look like “U.S.-style” litigation than like traditional private litigation in civil law regimes

We concluded the daylong roundtable discussion by asking each participant to offer a prediction regarding the future of global mass civil litigation ten years onward. In response, participants generally said they foresaw more litigation like VW and many, although not all, predicted—notwithstanding the day’s discussion of divergent procedural rules and differences in legal culture—that national approaches to mass claims will ultimately converge on something more like the U.S. aggregate and collective litigation model than conventional civil litigation in civil law regimes.

Lesson 10: It is too soon to design—much less implement—changes in the management or resolution of global litigation

When we planned the roundtable, we anticipated that the day’s discussion would lead to proposals to develop new practices, protocols, or procedures to make global litigation more efficient: less expensive and time-consuming, fairer for parties of different means, and better suited to serve public policy interests. The day’s discussion, however, indicated that even the most-sophisticated participants in this litigation feel that they know too little about formal and informal differences in procedure across domestic jurisdictions to be ready to propose significant reforms. Instead, participants called for more-frequent opportunities to share information about developments in their respective jurisdictions and more-objective data about the consequences of variations in substantive and procedural law. The RAND Institute for Civil Justice, Kenneth R. Feinberg Center on Catastrophic Risk Management and Compensation, and Stanford Law School hope to be leaders in the effort to promote information sharing and provide such data.

Attendee List

James Anderson
RAND
USA

The Honorable Edward Belobaba
Ontario Superior Court of Justice
Canada

Emily Berry
Stanford Law School
USA

Bob Boelema
The Netherlands Authority for Consumers
and Markets
Netherlands

Christopher Bogart
Burford Capital
USA

The Honorable Charles Breyer
U.S. District Court for Northern California
USA

Elizabeth Cabraser
Lieff, Cabraser, Heimann & Bernstein
USA

Peter Cashman
Three Wentworth Chambers
Australia

Paul Coenen
Vereniging van Effectenbezitters (VEB)
Netherlands

Hayden Coleman
Dechert LLP
USA

Catherine Cruz
RAND
USA

Lloyd Dixon
RAND
USA

Nora Engstrom
Stanford Law School
USA

Kenneth Feinberg
The Law Offices of Kenneth R. Feinberg
USA

Kevin Frederick
State Farm Insurance
USA

Robert Giuffra
Sullivan & Cromwell LLP
USA

Manuel Gómez
Florida International University
USA

Jutta Gurkmann
Verbraucherzentrale Bundesverband
Germany

Axel Halfmeier
Leuphana University
Germany

Deborah Hensler
Stanford Law School
USA

Nadine Herrmann
Quinn Emanuel
Germany

Jasminka Kalajdzic
University of Windsor
Canada

Christopher Lovrien
Jones Day
USA

Daan Lunsingh Scheurleer
NautaDutilh
Netherlands

Thomas Milch
Arnold & Porter Kaye Scholer LLP
USA

Jamie Morikawa
RAND
USA

The Honorable Bernard Murphy
Federal Court of Australia
Australia

David Nachman
Office of the New York Attorney General
USA

Nicholas Pace
RAND
USA

The Honorable Fabian Reuschle
Landgericht Stuttgart
Germany

The Honorable Lee Rosenthal
U.S. District Court for the Southern District
of Texas
USA

Christopher Seeger
Seeger Weiss LLP
USA

Will Setrakian
Stanford Law School
USA

Mary-Christine (MC) Sungaila
Haynes and Boone, LLP
USA

Ralph Sutton
Validity-Finance
USA

Ianika Tzankova
Tilburg University, Netherlands
Netherlands

John Walker
Investor Claim Partner Pty Ltd
Australia

Martina Wijngaarden
Freshfields
Germany

Cheryl Woodin
Bennett Jones
Canada

Charles Wright
Siskinds
Canada

Abbreviations

| | |
|------------|---|
| 3CV | Centro de Control y Certificación Vehicular (Vehicle Certification and Control Center) |
| ABRADECONT | Associação Brasileira de Defesa do Consumidor e Trabalhador (Brazilian Association of Consumer and Worker Protection) |
| ACCC | Australian Competition and Consumer Commission |
| BL | Bannister Law |
| CAFEE | Center for Alternative Fuels Engines and Emissions |
| CARB | California Air Resources Board |
| CDC | Código de Defesa do Consumidor (Consumer Defense Code) |
| CEO | chief executive officer |
| COVID-19 | coronavirus disease 2019 |
| CPA | Consumer Protection Act |
| CPS | Consumer Protection Statute |
| DOJ | U.S. Department of Justice |
| EPA | Environmental Protection Agency |
| EWHC | High Court of England and Wales |
| FCAFC | Full Court of the Federal Court of Australia |
| HCA | High Court of Australia |
| ICCT | International Council on Clean Transportation |
| JPML | Judicial Panel on Multidistrict Litigation |
| KapMuG | Kapitalanleger-Musterverfahrensgesetz (Capital Market Investors' Model Proceedings Act) |
| MB | Maurice Blackburn |
| MDL | multidistrict litigation |
| NSW | New South Wales |
| ODECU | Organización de Consumidores y Usuarios de Chile (Organization of Consumers and Users of Chile) |
| ONSC | Ontario, Canada Superior Court |
| SERNAC | Servicio Nacional del Consumidor (National Consumer Service) |
| UDAP | Unfair and Deceptive Acts and Practices |

| | |
|------|--|
| VW | Volkswagen |
| VZBV | Verbraucherzentrale Bundesverband eV (Federation of German Consumer Organisations) |
| WCAM | Dutch Act on Collective Settlements (Wet Collectieve Afwikkeling Massachade) |

Bibliography

Australasian Legal Information Institute, homepage, last updated April 21, 2021. As of April 21, 2021:

<http://www.austlii.edu.au/>

Australian Government, Federal Register of Information, Vehicle Standard (Australian Design Rule 79/04—Emission Control for Light Vehicles), 2011, Sec. 2, Applicability and Implementation. As of October 5, 2020:

<https://www.legislation.gov.au/Details/F2012C00284>

Australian Law Reform Commission, *Integrity, Fairness and Efficiency—an Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Brisbane, 2018.

Australian Law Reform Commission, “Inquiry into Class Action Proceedings Final Report,” press release, January 24, 2019.

Barkan, Ross, “Meet Ken Feinberg, the Master of Disasters,” *Observer*, March 9, 2016. As of October 2, 2020:

<https://observer.com/2016/03/meet-ken-feinberg-the-master-of-disasters/>

Bensadoun, Emerald, “Canada Charges Volkswagen 4 Years After Emissions Scandal,” *Global News*, December 9, 2019. As of October 5, 2020:

<https://globalnews.ca/news/6273290/canada-volkswagen-emissions-violations/>

Bergmann, Helmut, “Umsatz 2018: Freshfields-Kurve zeigt weiter nach oben,” *Juve*, July 5, 2019. As of October 5, 2020:

<https://www.juve.de/nachrichten/namenundnachrichten/nachrichtkanzleien/2019/07/umsatz-2018-freshfields-kurve-zeigt-weiter-nach-oben>

Bundesgerichtshof, 25 May 2020, VI ZR 252/19. As of October 5, 2020:

<https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=106368&pos=0&anz=1>

Bonyhady, Nick, “Government Pushes Ahead with Class Action Inquiry,” *Sydney Morning Herald*, May 13, 2020. As of October 5, 2020:

<https://www.smh.com.au/politics/federal/government-pushes-ahead-with-class-action-inquiry-20200512-p54s7m.html>

Bouland, Félix, “10.000 Belgian Owners Join Class Action Against Volkswagen,” *Newmobility.news*, June 19, 2019.

Brazilian Institute of the Environment and Renewable Natural Resources, “Ibama multa Volkswagen do Brasil em R\$50 milhões por fraude,” November 12, 2015. As of October 5, 2020:

https://www.gov.br/ibama/pt-br/assuntos/noticias/copy_of_noticias/noticias-2015/ibama-multa-volkswagem-do-brasil-em-r-50-milhoes-por-fraude

Brazilian Institute of the Environment and Renewable Natural Resources, “Ibama confirma multa de R\$50 milhões por fraude em testes de emissão e exige recall da Volkswagen,” March 24, 2017. As of October 2, 2020:

https://www.gov.br/ibama/pt-br/assuntos/noticias/copy_of_noticias/noticias-2017/ibama-confirma-multa-de-r-50-milhoes-por-fraude-em-testes-de-emissao-e-exige-recall-da-volkswagen

Brazilian Institute of the Environment and Renewable Natural Resources, Decisão Administrativa Eletrônica de la Instancia—Auto de Infração, No. 191/2017-SEDE/NUIP, No. Processo 02001.007032/2015-46, 2017.

- Breyer, Charles R., “Executive Summary of Final Class Settlement Program (2.0 Liter Engine Vehicles),” U.S. District Court, Northern District of California, undated-a. As of October 5, 2020:
<https://www.cand.uscourts.gov/judges/breyer-charles-r-crb/in-re-volkswagen-clean-diesel-mdl/final-2-0-l-settlement/>
- Breyer, Charles R., “Executive Summary of Final Class Settlement Program (3.0 Liter Engine Vehicles),” U.S. District Court, Northern District of California, undated-b. As of October 5, 2020:
<https://www.cand.uscourts.gov/judges/breyer-charles-r-crb/in-re-volkswagen-clean-diesel-mdl/final-3-0-l-settlement/>
- “Braunschweig ist Spitzenreiter bei VW-Klagen,” NDR, July 6, 2018. As of October 5, 2020:
https://www.ndr.de/nachrichten/niedersachsen/braunschweig_harz_goettingen/Braunschweig-ist-Spitzenreiter-bei-VW-Klagen,vw4366.html
- Carter, Terry, “Master of Disasters: Is Ken Feinberg Changing the Course of Mass Tort Resolution?” *ABA Journal*, January 1, 2011. As of October 2, 2020:
https://www.abajournal.com/magazine/article/master_of_disasters
- Cashman, Peter Kenneth, and Amelia Simpson, “Research Paper #6—Class Action Remedies: Cy-près; ‘An Imperfect Solution to an Impossible Problem,’” University of New South Wales Law, November 19, 2020a.
- Cashman, Peter Kenneth, and Amelia Simpson, “Research Papers #1 and #2—Class Actions and Litigation Funding Reform: The Rhetoric and the Reality,” University of New South Wales Law, December 1, 2020b.
- Cashman, Peter Kenneth, and Amelia Simpson, “Research Paper #7—Class Actions: Commercial Funding, Regulation and Conflicts of Interest,” University of New South Wales Law, December 1, 2020c.
- Cashman, Peter Kenneth, and Amelia Simpson, “Research Paper #3—Class Actions and Litigation Funding Reform: The Views of Class Action Practitioners,” University of New South Wales Law, December 4, 2020d.
- Cashman, Peter Kenneth, and Amelia Simpson, “Research Paper #4—the Problems of Delay in Class Actions,” University of New South Wales Law, December 11, 2020e.
- Cashman, Peter Kenneth, and Amelia Simpson, “Research Paper #5—Costs and Funding Commissions in Class Actions,” University of New South Wales Law, December 11, 2020f.
- Cauti, Carlo, “Volkswagen deve R\$65,5 mi em multas no Brasil por Dieselgate,” *Suno Notícias*, February 6, 2019. As of October 6, 2020:
<https://www.sunoresearch.com.br/noticias/volkswagen-tem-multas-brasil-Dieselgate/>
- Chiem, Linda, “Opt-Out Drivers’ Claims Trimmed Ahead of VW Bellwether,” *Law360*, February 4, 2019. As of April 23, 2021:
<https://www.law360.com/articles/1240676/opt-out-drivers-claims-trimmed-ahead-of-vw-bellwether>
- Cohen, Raphael S., “The Coronavirus Will Not Stop Globalization,” *Lawfare*, April 12, 2020. As of October 2, 2020:
<https://www.lawfareblog.com/coronavirus-will-not-stop-globalization>
- Collins, Jennifer, “Volkswagen Crisis Spreads to Asia,” *DW.com*, September 22, 2015. As of October 6, 2020:
<https://www.dw.com/en/volkswagen-crisis-spreads-to-asia/a-18727960>

- “COVID-19 Complaint Tracker,” *Hunton Andrews Kurth*, webpage, July 7, 2020. As of October 2, 2020:
<https://www.huntonak.com/en/covid-19-tracker.html>
- Diário Oficial, Poder Executivo—Seção I, São Paulo: Imprensa Oficial, Vol. 129, No. 84, 2019, pp. 37–38.
- Diesel Emissions Justice Foundation, “News,” webpage, undated. As of October 5, 2020:
https://www.emissionsjustice.com/en_fr/progress-en-fr/
- Diesel Emissions Justice Foundation, “Dieselgate: La Fondation Diesel Emissions Justice annonce une action collective contre Volkswagen,” press release, January 23, 2020. As of October 5, 2020:
https://ps-image-bucket.s3.amazonaws.com/emissionsjustice/wp-content/uploads/2020/01/CP_DEJF_FRFR23012020_final7490.pdf
- “Dieselgate: Participez à l’action collective!” Familles rurales, January 23, 2020. As of October 5, 2020:
<https://www.famillesrurales.org/1285/Dieselgate-participez-laction-collective>
- Duke Law Center for Judicial Studies, *Guidelines and Best Practices for Large and Mass-Tort MDLs*, 2nd ed., Durham, N.C., September 2018. As of October 2, 2020:
<https://judicialstudies.duke.edu/wp-content/uploads/2018/09/MDL-2nd-Edition-2018-For-Posting.pdf>
- Einsele, Dorothee, “Kapitalmarktrecht und Internationales Privatrecht,” *RabelsZ*, Vol. 81, 2017, pp. 781–814.
- Eisenberg, Theodore, and Geoffrey P. Miller, “Attorney Fees in Class Action Settlements: An Empirical Study,” *Journal of Empirical Legal Studies*, Vol. 1, March 2004, pp. 27–78.
- Eisenberg, Theodore, and Geoffrey P. Miller, “Attorney Fees and Expenses in Class Action Settlements: 1993–2008,” *Journal of Empirical Legal Studies*, Vol. 7, June 2010, pp. 248–281.
- Eisenberg, Theodore, Geoffrey Miller, and Roy Germano, “Attorney Fees in Class Actions, 2009–2013,” *NYU Law Review*, Vol. 92, No. 4, October 2017, pp. 937–970.
- “EU Collective Redress and GDPR,” *TechUK*, June 24, 2020.
- European Commission, “Common Position of National Authorities Within the CPC Network,” undated. As of October 5, 2020:
<https://ec.europa.eu/info/sites/info/files/cpcvcommonposition.pdf>
- European Union, “Directive (EU) 2020/1828 of the European Parliament and of the Council,” November 25, 2020. As of April 22, 2020:
<https://eur-lex.europa.eu/eli/dir/2020/1828/oj>
- Farrell, Sean, and Graham Ruddick, “Volkswagen CEO Martin Winterkorn Quits over Diesel Emissions Scandal,” *The Guardian*, September 23, 2015. As of October 6, 2020:
<https://www.theguardian.com/business/2015/sep/23/volkswagen-ceo-martin-winterkorn-quits-over-diesel-emissions-scandal>
- Federal Court of Australia, “Current Class Actions,” webpage, updated March 31, 2021. As of April 16, 2021:
<https://www.fedcourt.gov.au/law-and-practice/class-actions/class-actions>
- Fitzpatrick Brian T., “An Empirical Study of Class Action Settlements and Their Fee Awards,” *Journal of Empirical Legal Studies*, Vol. 7, No. 4, December 2010, pp. 811–846.

Formica, Federico, “Dieselgate, chiesta l’archiviazione per i vertici di Volkswagen Italia,” *La Repubblica*, April 20, 2020.

Fundação Procon–São Paulo, “Empresa utilizou software que mascara emissões de gases na Amarok,” November 15, 2015. As of October 2, 2020:
<https://www.procon.sp.gov.br/procon-sp-autua-volkswagen/>

G1, “Volkswagen é multada em R\$ 7,2 milhões no Brasil pelo ‘Dieselgate,’” *Auto Esporte*, February 5, 2020.

Gelbach, Jonah, and Deborah Hensler, “Beyond Alternative Facts: Preliminary Descriptive Analysis of Federal Putative Class Actions, 2005–2012,” *Fordham Law Conference*, Vol. 87, No. 1, February 2018.

Gidi, Antonio, “Class Actions in Brazil—a Model for Civil Law Countries,” *American Journal of Comparative Law*, Vol. 51, No. 2, Spring 2003, pp. 311–408.

Gómez, Manuel A., “Will the Birds Stay South? The Rise of Class Actions and Other Forms of Group Litigation Across Latin America,” *Miami International American Law Review*, Vol. 43, No. 2, 2012.

Greene, Jenna, “Daily Dicta: VW Opt-Out Plaintiffs Crash with Minuscule Damages,” *Law.com*, March 5, 2020. As of April 23, 2021:
<https://www.law.com/litigationdaily/2020/03/05/daily-dicta-vw-opt-out-plaintiffs-crash-with-minuscule-damages/>

Grinover, Ada Pellegrini, “Hacia un sistema Iberoamericano de tutela de intereses transindividuales,” in *La tutela de los derechos difusos, colectivos e individuales homogéneos*, Mexico City: Editorial Porrúa, Instituto Iberoamericano de Derecho Procesal, 2003.

Grinover, Ada Pellegrini, “Brazil,” *Annals of the American Academy of Political and Social Science*, Vol. 622, No. 1, 2009, pp. 63–67.

Hensler, Deborah R., “From Sea to Shining Sea: How and Why Class Actions Are Spreading Globally,” *Kansas Law Review*, Vol. 65, 2017, pp. 965–988.

Hensler, Deborah R., Christopher Hodges, and Magdalena Tulibacka, eds., *The Globalization of Class Actions*, Thousand Oaks, Calif.: SAGE Publications, 2009.

Hensler, Deborah R., Christopher Hodges, and Ianika Tzankova, *Class Actions in Context: How Culture, Economics and Politics Shape Collective Litigation*, Cheltenham, UK: Edward Elgar Publishing Limited, 2016.

International Council on Clean Transportation, “Mission/History,” webpage, undated. As of October 6, 2020:
<https://theicct.org/mission-history>

“Italy Court to Take on Consumer Group Action Against VW,” *Reuters*, May 25, 2017. As of October 5, 2020:
<https://www.reuters.com/article/volkswagen-emissions-italy/italy-court-to-take-on-consumer-group-class-action-against-vw-idUSL8N1IR3QK>

Ivory, Danielle, “VW Names Kenneth Feinberg to Oversee Fund for Claims on Emissions Deception,” *New York Times*, December 17, 2015. As of October 6, 2020:
<https://www.nytimes.com/2015/12/18/business/ken-feinberg-vw-lawsuit-compensation-fund.html>

Jackson, Emily, “Ottawa Slaps Volkswagen with \$196.5-Million Fine for ‘Dieselgate’—Largest Ever Environmental Penalty in Canada’s History,” *Financial Post*, January 22, 2020.

Jade, homepage, undated. As of October 6, 2020:

<https://jade.io/j/>

Justice Québec, “Fonds d’aide aux actions collectives,” homepage, undated. As of October 2, 2020:

<http://www.faac.justice.gouv.qc.ca/>

Kalajdzic, Jasminka, Peter Cashman, and Alana Longmoore, “Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding,” *American Journal of Comparative Law*, Vol. 61, No. 2, February 2013.

Klonoff, Robert, *Class Actions and Other Multi-Party Litigation in a Nutshell*, St. Paul, Minn.: West Academic Publishing, 2017.

Kopp, Emily, “Corporations and Consumer Groups Battle over COVID-19,” *Roll Call*, May 21, 2020. As of October 2, 2020:

<https://www.rollcall.com/2020/05/21/>

[corporations-and-consumer-groups-battle-over-covid-19-liability/](https://www.rollcall.com/2020/05/21/corporations-and-consumer-groups-battle-over-covid-19-liability/)

Law Commission of Ontario, *Class Actions: Objectives, Experiences and Reforms; Final Report*, Toronto, July 2019.

Lewis, Sara, “Volkswagen Could Face More Dieselgate Fallout,” *WardsAuto*, April 15, 2020. As of October 5, 2020:

<https://www.wardsauto.com/engines/volkswagen-could-face-more-Dieselgate-fallout>

Londoño Toro, Beatriz, and Laura Victoria García-Matamoros, “Análisis de las estadísticas sobre acciones populares y derechos colectivos,” *Tutela: Acciones populares y de cumplimiento*, Vol. 3, No. 29, May 2002.

Maher, Stephen, “How Did VW Avoid Criminal Charges in Canada over Its Emissions Cheating?” *Maclean’s*, January 21, 2020. As of October 5, 2020:

<https://www.macleans.ca/opinion/how-did-vw-avoid-criminal-charges-in-canada-over-its-emissions-cheating/>

Morabito, Vince, “An Evidence-Based Approach to Class Action Reform in Australia: Competing Class Actions and Comparative Perspectives on the Volume of Class Action Litigation in Australia,” SSRN, July 11, 2018.

Morabito, Vince, “An Evidence-Based Approach to Class Action Reform in Australia: Common Fund Orders, Funding Fees and Reimbursement Payments,” SSRN, February 11, 2019.

Moses, Margaret L., *The Principles and Practice of International Commercial Arbitration*, 3rd ed., Cambridge, UK: Cambridge University Press, 2017.

New York State Office of the Attorney General, “Statement from A.G. Schneiderman on Volkswagen Investigation,” press release, September 22, 2015. As of October 6, 2020:

<https://ag.ny.gov/press-release/2015/statement-ag-schneiderman-volkswagen-investigation>

New York State Office of the Attorney General, “A.G. Schneiderman Announces Partial Multistate and Federal Settlements of Up to \$15 Billion with Volkswagen, Audi and Porsche, Including Unprecedented Relief for Defrauded New Yorkers,” press release, June 28, 2016a. As of October 6, 2020:

<https://ag.ny.gov/press-release/2016/ag-schneiderman-announces-partial-multistate-and-federal-settlements-15-billion>

New York State Office of the Attorney General, “NY A.G. Schneiderman, Massachusetts A.G. Healey, Maryland A.G. Frosh Announce Suits Against Volkswagen, Audi and Porsche Alleging They Knowingly Sold over 53,000 Illegally Polluting Cars and SUVs, Violating State Environmental Laws,” press release, July 19, 2016b. As of October 6, 2020:
<https://ag.ny.gov/press-release/2016/ny-ag-schneiderman-massachusetts-ag-healey-maryland-ag-frosh-announce-suits>

New York State Office of the Attorney General, “A.G. Schneiderman Announces Volkswagen to Pay New York \$32.5 Million—Marking First-Ever NY State Environmental Enforcement Penalty Against an Automaker for Emissions Violations,” press release, March 30, 2017. As of October 6, 2020:
<https://ag.ny.gov/press-release/2017/ag-schneiderman-announces-volkswagen-pay-new-york-325-million-marking-first-ever>

Noelting, Christoph, and David McHugh, “German Court Ruling Clears the Way to Settle VW Diesel Cases,” AP News, May 25, 2020. As of May 14, 2021:
<https://apnews.com/article/e4b93761f2e0f6e5da03df73d48b05a5>

Oehmke, Philipp, “Out of Nowhere: The Three Students Who Discovered Dieselpgate,” *Der Spiegel*, October 23, 2017.

Order Granting Entry of Consent Decree, *United States v. Volkswagen AG et al.*, No. 16-cv-295 (N. Dist. Calif.), October 25, 2016. As of October 5, 2020:
<https://www.cand.uscourts.gov/filelibrary/2869/Order-Granting-Entry-of-Consent-Decree.pdf>

Order Granting Final Approval of the 2.0-Liter Consumer and Reseller Dealership Class Action Settlement, *United States of America v. Volkswagen AG et al.*, No. 16-cv-295 (N. Dist. Calif.), October 25, 2016. As of October 5, 2020:
<https://www.cand.uscourts.gov/filelibrary/2867/Order-Granting-Final-Approval-of-Consumer-Sett.pdf>

Order Granting Motion for Preliminary Approval of Settlement, *In re Volkswagen “Clean Diesel” Marketing, Sales Practices, and Products Liability Litigation*, No. 3:15-md-02672-CRB, Document 5593, November 28, 2018. As of October 5, 2020:
<https://www.cand.uscourts.gov/filelibrary/3519/5593-Order-Granting-ADR-Plaintiffs-Motion-for.pdf>

Order Granting Motions to Remand, *In re Volkswagen “Clean Diesel” Marketing, Sales Practices, and Products Liability Litigation*, No. 3:15-md-02672-CRB, Document 3259, May 23, 2017. As of October 5, 2020:
<https://www.cand.uscourts.gov/filelibrary/3083/3259-Order-Granting-Motions-to-Remand-of-State.pdf>

Order Granting Motions to Remand, *United States v. Volkswagen AG et al.*, No. 16-cv-295 (N. Dist. Calif.), May 23, 2017. As of October 5, 2020:
<https://www.cand.uscourts.gov/filelibrary/3083/3259-Order-Granting-Motions-to-Remand-of-State.pdf>

Order Granting Plaintiffs’ Motion for Attorneys’ Fees and Costs Relating to 2.0-Liter Settlement, *In re Volkswagen “Clean Diesel” Marketing, Sales Practices, and Products Liability Litigation*, No. 3:15-md-02672-CRB, Document 3053, May 17, 2017. As of October 5, 2020:
<https://www.cand.uscourts.gov/filelibrary/2982/3053-Order-Granting-PSC-s-Motion-for-Fees-for.pdf>

Organización de Consumidores y Usuarios de Chile, “Quiénes Somos,” webpage, undated. As of April 26, 2021:
<https://www.odecu.cl/quienes-somos/>

Parliament of Australia, “Litigation Funding and the Regulation of the Class Action Industry,” undated. As of October 6, 2020:

https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Litigationfunding

Pedrazzi, Giorgio, “Civil and Consumer Law,” in Marco Frigessi di Rattalma, ed., *The Dieselgate: A Legal Perspective*, New York: Springer, 2017, pp. 113–120.

Plaintiffs’ Notice of Motion and Motion for Attorneys’ Fees and Costs Under Fed. R. Civ. P. 23(H) and Pretrial Order Nos. 7 and 11; Memorandum of Points and Authorities in Support Thereof, *In re Volkswagen “Clean Diesel” Marketing, Sales Practices, and Products Liability Litigation*, No. 3:15-md-02672-CRB, Document 2175, November 8, 2016. As of October 5, 2020: <https://www.cand.uscourts.gov/filelibrary/2876/Mot-for-Attorneys-Fees.pdf>

Potilove, Ellen, “Kenneth Feinberg Master of Disaster Discusses Victim Compensation Funds with Oasis,” Johns Hopkins University, Montgomery County, March 6, 2018. As of October 2, 2020:

<http://mcc.jhu.edu/news/kenneth-feinberg-master-of-disaster-discusses-victim-compensation-funds-with-oasis>

Randazzo, Sarah, and Micah Maidenberg, “Boeing Hires Kenneth Feinberg to Handle 737 MAX Claims,” *Wall Street Journal*, July 17, 2019. As of October 2, 2020:

<https://www.wsj.com/articles/boeing-hires-kenneth-feinberg-to-handle-payments-to-crash-victims-families-11563377446>

Rechtspraak, “Centraal register voor collectieve vorderingen,” webpage, undated. As of October 6, 2020:

<https://www.rechtspraak.nl/Registers/centraal-register-voor-collectieve-vorderingen>

“Reportaje Canal 13: Dieselgate; El escándalo automotriz en Chile,” T13, September 9, 2018.

Report of Independent Claims Supervisor on Volkswagen’s Progress and Compliance Related to 2.0 Liter Resolution Agreements Entered October 25, 2016, *In re Volkswagen “Clean Diesel” Marketing, Sales Practices, and Products Liability Litigation*, No. 3:15-md-02672-CRB, Document 5585, November 17, 2018. As of October 5, 2020:

<https://www.cand.uscourts.gov/filelibrary/3517/5585-November-26-2018-Report-on-the-2.0-Liter.pdf>

Report of Independent Claims Supervisor on Volkswagen’s Progress and Compliance Related to 3.0 Liter Resolution Agreements Entered May 17, 2017, *In re Volkswagen “Clean Diesel” Marketing, Sales Practices, and Products Liability Litigation*, No. 3:15-md-02672-CRB, Document 6384, June 13, 2019. As of October 5, 2020:

<https://www.cand.uscourts.gov/filelibrary/3704/6384-June-13-2019-Report-on-the-3.0-Liter-Reso.pdf>

Rosenn, Keith S., “Civil Procedure in Brazil,” *American Journal of Comparative Law*, Vol. 34, 1986, pp. 487–525.

Sanger, David E., David D. Kirkpatrick, Carl Zimmer, Katie Thomas, and Sui-Lee Wee, “Profits and Pride at Stake, the Race for a Vaccine Intensifies,” *New York Times*, May 2, 2020.

Settlement Class Counsel’s Statement of Additional Information Regarding Prospective Request for Attorneys’ Fees and Costs, *In re Volkswagen “Clean Diesel” Litigation*, No. 3:15-md-02672-CRB, Document 1730, August 10, 2016. As of October 5, 2020: <https://www.cand.uscourts.gov/filelibrary/2809/Statement-re-Attorneys-Fees.pdf>

Shephardson, David, “Bosch Concealed Volkswagen Use of ‘Defeat Device’ Software: Lawyers,” Reuters, September 8, 2016. As of October 6, 2020:
<https://www.reuters.com/article/us-volkswagen-emissions-bosch-idUSKCN11D022>

Stanford University, “Global Class Actions Exchange,” webpage, undated. As of October 2, 2020:
<http://globalclassactions.stanford.edu/>

Steinitz, Maya, *The Case for an International Court of Civil Justice*, Cambridge, UK: Cambridge University Press, 2018.

Sullivan & Cromwell LLP, “S&C Leads Volkswagen to Victory in First Bellwether Trial over Vehicle Emissions,” March 17, 2020. As of April 23, 2021:
<https://www.sullcrom.com/sandc-leads-volkswagen-to-victory-in-first-bellwether-trial-over-diesel-emissions>

Sungaila, Mary-Christine, and Marco A. Pulido, “Global Litigation After the Coronavirus Pandemic,” Law.com, March 3, 2020. As of October 2, 2020:
<https://www.law.com/therecorder/2020/03/30/global-litigation-after-the-coronavirus-pandemic/?slreturn=20200908155207>

Topgear Autoguide, “Herbert Diess: Legal Trouble After Appearance at Markus Lanz,” July 9, 2019. As of May 14, 2021:
<https://topgear-autoguide.com/category/formula-1/herbert-diess-legal-trouble-after-appearance-at-markus-lanz1607110722>

Transcript of Proceedings, *In re Volkswagen “Clean Diesel” Litigation*, MDL 2672, Document 17, March 24, 2016. As of October 5, 2020:
https://www.cand.uscourts.gov/filelibrary/1728/March_24_Transcript.pdf

Transcript of Proceedings, *In re Volkswagen “Clean Diesel” Litigation*, MDL 2672, Document 1270, February 25, 2016. As of October 5, 2020:
https://www.cand.uscourts.gov/filelibrary/1721/Feb_25_Transcript.pdf

Transcript of Proceedings, *In re Volkswagen “Clean Diesel” Litigation*, MDL 2672, Document 1439, April 21, 2016, pp. 5–10. As of October 5, 2020:
https://www.cand.uscourts.gov/filelibrary/1738/April_21_Transcript.pdf

Tzankova, Ianika, “Funding of Mass Disputes: Lessons from the Netherlands,” *George Mason Journal of Law, Economics and Policy*, Vol. 8, 2012, pp. 561–569.

Tzankova, Ianika, “Everything You Wanted to Know About Dutch Foundations but Never Dared to Ask: A Check List for Investors,” *Zeitschrift fur Verbraucherrecht*, February 10, 2016.

Tzankova, Ianika, and Daan Lunsingh Scheurleer, “The Netherlands,” *Annals of the American Academy of Political and Social Science*, Vol. 622, No. 1, March 2009, pp. 149–160.

“UK Drivers Win First Round in VW ‘Dieselgate’ Case,” BBC News, April 6, 2020. As of October 5, 2020:
<https://www.bbc.com/news/business-52184229>

United Nations Economic Commission for Europe, Regulation 83, Uniform Provisions Concerning the Approval of Vehicles with Regard to the Emission of Pollutants According to Engine Fuel Requirements—Applicability, December 27, 2006.

U.S. Department of Justice, “Volkswagen AG Agrees to Plead Guilty and Pay \$4.3 Billion in Criminal and Civil Penalties; Six Volkswagen Executives and Employees Are Indicted in Connection with Conspiracy to Cheat U.S. Emissions Tests,” press release, January 11, 2017. As of October 5, 2020:

<https://www.justice.gov/opa/pr/volkswagen-ag-agrees-plead-guilty-and-pay-43-billion-criminal-and-civil-penalties-six>

U.S. Department of Justice, “Former CEO of Volkswagen AG Charged with Conspiracy and Wire Fraud in Diesel Emissions Scandal,” press release, May 3, 2018. As of October 5, 2020:

<https://www.justice.gov/opa/pr/former-ceo-volkswagen-ag-charged-conspiracy-and-wire-fraud-diesel-emissions-scandal>

U.S. Department of Justice, “Pending Criminal Division Cases: Volkswagen Diesel Engine Vehicle Matters,” webpage, last updated December 18, 2018. As of May 18, 2021:

<https://www.justice.gov/criminal-vns/case/volkswagen-diesel-engine-vehicle-matters>

U.S. Judicial Panel on Multidistrict Litigation, *In Re: Volkswagen “Clean Diesel” Litigation*, transfer order, MDL 2672, December 8, 2015. As of October 2, 2020:

<https://www.jpml.uscourts.gov/sites/jpml/files/MDL-2672-Transfer-Order-07-18-Wright%20Law.pdf>

Verbraucherzentrale, “Fragen & Antworten (FAQ) zum Vergleich gegen VW,” September 2, 2020a. As of April 26, 2021:

<https://www.musterfeststellungsklagen.de/vw/faq-vergleich>

Verbraucherzentrale, “Vergleich zwischen vzbv und Volkswagen steht: Klage zurückgenommen,” September 7, 2020b. As of October 5, 2020:

<https://www.verbraucherzentrale.de/wissen/vertraege-reklamation/kundenrechte/vergleich-zwischen-vzbv-und-volkswagen-steht-klage-zurueckgenommen-29738>

Victorian Law Reform Commission, *Access to Justice—Litigation Funding and Group Proceedings*, Melbourne, Australia: Victorian Government Printer, 2018.

Volkswagen AG, “Vergleichsportal geschlossen,” webpage, undated. As of October 5, 2020: <https://www.mein-vw-vergleich.de>

Votsmeier, Volker, “Landgericht Stuttgart erklärt Dieseltgate-Richter für befangen,” *Handelsblatt*, April 30, 2019. As of October 5, 2020:

<https://www.handelsblatt.com/unternehmen/industrie/volkswagen-landgericht-stuttgart-erklaert-Dieseltgate-richter-fuer-befangen/24272818.html?ticket=ST-237185-nckBlmnxMeIZdklr6rVU-apl>

Votsmeier, Volker, “Berater im Dieselskandal kosten den VW-Konzern mehr als 1,7 Milliarden Euro,” *Handelsblatt*, June 14, 2019. As of October 5, 2020:

<https://www.handelsblatt.com/unternehmen/industrie/autohersteller-berater-im-dieselskandal-kosten-den-vw-konzern-mehr-als-1-7-milliarden-euro/24457804.html?ticket=ST-209253-gIbVvEiCiaFkghvWLD69-apl>

“VW Faces ‘Dieseltgate’ Lethal Threat in France,” *The Connexion*, January 27, 2020. As of October 5, 2020:

<https://www.connexionfrance.com/French-news/Car-manufacturer-Volkswagen-faces-new-Dieseltgate-legal-threat-in-France>

VW Investor Settlement Foundation, “Governance,” webpage, undated.

Willems, Huub, “Nederlandse beleggersstichting haalt bakzijl bij Volkswagen en heft zichzelf op, by Heiko Jessayan,” University of Groningen, June 21, 2020. As of October 5, 2020: [https://www.rug.nl/research/portal/clippings/nederlandse-beleggersstichting-haalt-bakzeil-bij-volkswagen-en-heft-zichzelf-op\(0b305a5e-9139-468f-805e-b35dffdbdc72\).html](https://www.rug.nl/research/portal/clippings/nederlandse-beleggersstichting-haalt-bakzeil-bij-volkswagen-en-heft-zichzelf-op(0b305a5e-9139-468f-805e-b35dffdbdc72).html)