



Alison Frankel

U.S. law firms are betting on control of VW litigation overseas

By Alison Frankel
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For all of the Sturm und Drang over class actions in the United States, Europe is borrowing not only the American concept of consolidated litigation but also U.S. lawyers to figure out how to deal with one of the biggest corporate liability exposures in the world.

On Wednesday, the litigation funder Burford Capital announced that it is teaming up with the law firm Hausfeld to pursue claims in Germany against Volkswagen. In an interview, Michael Hausfeld told me he and the funder are considering actions on behalf of both VW shareholders and owners of VW cars equipped with software to cheat emissions tests, but their primary focus right now is a consumer case for car owners. He also said he's looking into a British antitrust class action under a recent law permitting such cases in the U.K.

Hausfeld joins two other prominent U.S. firms already in the hunt to lead overseas litigation against Volkswagen. Way back on Oct. 1, the litigation financier Bentham announced that it would be working with Quinn Emanuel Urquhart & Sullivan to bring a shareholder action in Germany under Germany's investor protection law, known as KapMuG. (The hedge fund advisory firm Elliott Management is also part of the Bentham group.)

Later in October, the plaintiffs' firm Labaton Sucharow said it had established a Dutch "stichting," or nonprofit litigation group, for VW investors who want to sue the company for fraudulently failing to warn them about the emissions scandal. Labaton has since set up a second stichting, according to name partner Lawrence Sucharow, for owners of VW clean diesel cars with emissions-masking software.

Sucharow told me Wednesday that his firm is actively courting VW investors for the Dutch securities stichting. Bentham's Jeremy Marshall, meanwhile, said he's working with Quinn to persuade VW shareholders that joining his group and suing in Germany is the best route. His goal, he said, is to assemble a group of investors to be appointed "model plaintiffs" to lead the KapMuG litigation in Germany. All model plaintiff candidates have to file leadership applications by March, he said.

The VW case is apparently the first time major securities campaigns have been underway at the same time in Holland and Germany – and no one seems to be sure how litigation in the two countries will intersect. In Germany, as in England, investors must opt in to securities cases. Multiple law firms can assemble different groups of shareholders, but only the group appointed to serve as the model plaintiff actually litigates the case. The system is designed to discourage multiple groups from applying for leadership because plaintiffs have to pay millions of dollars in upfront court fees to start a case. Nor is there a fee incentive for lawyers who represent model plaintiffs. According to Miller, law firms are not permitted to work on contingency in Germany. Funders pay lawyers' fees while the case is ongoing and take a percentage of their shareholder group's recovery when the litigation concludes.

Miller said he expects the shareholder groups being assembled to sue in Germany ultimately to cooperate with one another. He also said it is "not unlikely" a VW settlement would involve the Dutch stichting as well.

But Sucharow told me VW can settle with its investors just through his case in Holland, without worrying about the German litigation. Unlike KapMuG suits, stichting settlements are opt-out, meaning settlements under the Dutch law bind all investors who don't pursue individual claims. "It's not like I'm happy leaving it to Volkswagen," Sucharow said. "But the only place that can give VW complete relief right now is the Netherlands."

Sucharow pointed out that German KapMuG litigation can drag on for years – the biggest such case, against Deutsche Telecom, is still under way after more than five years of litigation – while defendants such as Shell have already used the Dutch class action device to resolve international securities claims. He also said shareholder lawyers' fees are capped at 18 percent in stichting settlements and could be higher in the German system.

Sucharow said his stichting for car owners will address claims only by VW consumers outside of the U.S., noting with a laugh that he doesn't want to make enemies of the hundreds of plaintiffs' lawyers in the U.S. who have filed consumer class actions for VW owners.) His firm, Quinn Emanuel and Hausfeld have all brought class actions against VW in the U.S. even as they build European cases.

I asked Hausfeld, the latest entrant, whether he favors the Dutch or German system for securities claims by VW investors. He said he "has alliances" with teams in both camps and is consulting with VW shareholders he represents in other cases to decide whether to back the stichting or KapMuG procedure.

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