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9th Circ. Leaves VW Bracing For Post-Sale Tampering Claims

By [Linda Chiem](#)

Law360 (June 2, 2020, 10:00 PM EDT) -- The Ninth Circuit has poked holes in a federal shield that allowed [Volkswagen](#) to dodge claims that it violated two U.S. counties' anti-tampering laws during its 2015 clean diesel emissions-cheating scandal, exposing the German automaker to additional damages and prolonged legal battles.

The appeals court on Monday [cleared a path](#) for Hillsborough County, Florida, and Salt Lake County, Utah, to enforce county regulations prohibiting tampering with vehicles' emission controls, reversing a California federal judge's finding that the Clean Air Act [preempted their claims](#).

The decision opens Volkswagen Group of America Inc. up to what the Ninth Circuit described as potentially "staggering" and "unexpected and enormous liability," and sets back the automaker's efforts to move past its 2015 admission that it rigged more than 500,000 "clean" diesel vehicles in the U.S. with emissions-cheating software known as defeat devices.

With Volkswagen already preparing an appeal before an en banc panel of the Ninth Circuit or the [U.S. Supreme Court](#), experts say it might also have to brace for fresh legal clashes with state and local governments.

"Given that 40 states plus the District of Columbia have anti-tampering regulations in place, VW is potentially up against significant additional cases," said Julie Domike, a [Babst](#)

[Calland Clements & Zomnir PC](#) shareholder specializing in environmental, mobility, transport and safety matters. "Perhaps the only limitation to extensive litigation is the statute of limitations, which varies from state to state, but usually does not exceed five years from the date of discovery of the violation."

The Ninth Circuit's ruling is significant because it's the first case in which any entity other than the [U.S. Environmental Protection Agency](#) or the [California Air Resources Board](#) — the two agencies that regulate emissions standards in the U.S. — has enforced anti-tampering regulations, according to Domike.

And that may embolden state and local governments, especially since the ruling appears to give them "broad powers and jurisdiction over post-sale automobile regulations, even if they relate to emissions," said Noah Perch-Ahern, a environmental law partner at [Greenberg Glusker Fields Claman & Machtinger LLP](#).

"That said, the court's analysis was predicated in part on the fact that anti-tampering laws are not different [from] federal law," he said. "Other types of post-sale emissions regulations may not survive a similar preemption analysis."

"You will almost certainly see a large number of new claims from states and/or similarly situated governmental plaintiffs," Perch-Ahern added. "Keep in mind that Volkswagen has already indicated it will seek rehearing by the Ninth Circuit and Supreme Court review as necessary. They have not reached the end of the road."

According to the Ninth Circuit, the two counties can't sue Volkswagen for installing defeat devices in new cars, because the CAA expressly preempts state and local government efforts to apply anti-tampering laws to "pre-sale" vehicles.

But the counties can go after Volkswagen for tampering with "post-sale" vehicles — cars that are registered, licensed and in use — specifically because it issued recalls and updated software on the defeat devices to continue evading compliance with federally mandated emission standards, the Ninth Circuit said.

"In this context, the counties can regulate Volkswagen's post-sale tampering with vehicles' emission control systems to make them less effective just as it can penalize the local garage mechanic who disconnects vehicles' emission control devices to improve

performance or gas mileage," the Ninth Circuit said.

The Ninth Circuit ruling veers from several state courts, including [Alabama](#), [Illinois](#), [Missouri](#), [Minnesota](#) and [Tennessee](#), which have sided with Volkswagen on the CAA preemption argument. Those earlier wins for Volkswagen [had reinforced](#) the federal government's authority to regulate motor vehicle and emissions standards.

Volkswagen said in a statement Monday that those other courts "rightly recognized the chaos that would ensue if thousands of localities can regulate manufacturers' updates of their software systems, which are an inherent feature of modern vehicles and, in this case, reduced emissions."

But Volkswagen's CAA preemption shield took some hits. The [Ohio Supreme Court](#) is [mulling over](#) Volkswagen's challenge to a recently revived Buckeye State lawsuit alleging the automaker violated state anti-tampering laws during its diesel emissions-cheating scheme. Volkswagen initially prevailed when a Franklin County Court of Common Pleas granted its motion to dismiss the state's suit in 2018. But the state Tenth Appellate District reversed Volkswagen's win in December, and the company asked Ohio's highest court to step in.

And Texas' Third District Court of Appeals last year [kept alive](#) claims from the state, Fort Bend County and Harris County alleging Volkswagen flouted their environmental and anti-tampering laws. Volkswagen petitioned Texas' high court to review that decision, but the justices in November [declined to take it up](#).

All told, Volkswagen said it's paid out more than \$25 billion in fines, penalties and settlements in the U.S. over the emissions-cheating scandal. That includes an overall [\\$14.7 billion deal](#) Volkswagen reached in 2016 with federal and state regulators, including the [U.S. Department of Justice](#) and the EPA. The bulk of that deal — \$10 billion — went toward compensating Volkswagen customers for claims tied to the 2-liter TDI "clean diesel" vehicles. Volkswagen in 2017 cut a \$1.2 billion deal to settle civil claims tied to its 3-liter TDI vehicles.

The Ninth Circuit pointed out that despite all those settlements, Volkswagen "failed to obtain a release of liability from state and local governments at the same time."

"We may not strain to give Volkswagen the equivalent of a release from state and local liability (which it did not secure for itself) by engaging in a 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives,'" the Ninth Circuit said. "Such an endeavor would undercut the principle that it is Congress rather than the courts that preempts state law."

Volkswagen has countered that those settlements released all civil claims related to CAA violations and harm from the defeat devices. Some experts say the Ninth Circuit's take on the claims release was surprising.

"[It] seemed shocking to me that [the Ninth Circuit noted] they didn't get a release with regard to all of the states on all of these issues. A release in a case of this magnitude would typically be extremely broad," said Aaron Jacoby, head of [Arent Fox LLP's](#) automotive practice. "Volkswagen's defenses, whatever they are in this case, would remain intact, but the counties have carved out an area that at least the Ninth Circuit is saying they're allowed to pursue."

Greenberg Glusker's Perch-Ahern agreed that the Ninth Circuit's view of the claims release "was interesting and provocative language."

"The court was pointing out that the settlement history is informative in that there was no release by the states (except California) or local governments. The implication is that Volkswagen should not be surprised that it still faces significant exposure," he said. "This is somewhat at odds with the court's acknowledgment that the court's ruling may result in 'unexpected' liability."

Going forward, car manufacturers will still make adjustments to post-sale vehicles or engines to improve how the car operates or to correct an issue that was discovered after the vehicle racked up several miles. But the Ninth Circuit ruling may prompt automakers to more thoroughly vet any post-sale fixes and recalls they issue, experts say.

"One result of this ruling may be increased scrutiny by manufacturers to ensure their field fixes are solidly within legal bounds, with any marginal issue being submitted first to EPA and CARB for approval before making the fix," Babst Calland's Domike said.

Perch-Ahern agreed, saying that "as a practical matter, the industry should now be thinking about the liability exposure it may face based on any post-sale conduct, such as recalls and work on previously sold vehicles, that may be regulated by a large array of state and local laws."