

Biz Groups Back VW In 9th Circ. Query On Fraud Standard

By **Dean Seal**

Law360 (February 11, 2020, 11:11 PM EST) -- The U.S. Chamber of Commerce, a former commissioner of the U.S. Securities and Exchange Commission and a cadre of law professors are among the amici who've thrown support behind Volkswagen's request for Ninth Circuit guidance on a key reliance standard in securities fraud claims.

Two amicus briefs filed Monday underscore apparent industry concerns about a California federal judge's application of the U.S. Supreme Court's 1972 *Affiliated Ute* decision — which established that securities fraud claims can survive based on a presumption of reliance on a company's omission — in preserving putative class claims that Volkswagen AG tricked investors into buying overpriced bonds by hiding its emissions defeat devices.

With that federal judge's blessing, Volkswagen has asked the Ninth Circuit to clarify how the narrow *Affiliated Ute* presumption of reliance can apply to a case, such as the emissions suit at hand, where a defendant is alleged to have made statements that were "misleadingly incomplete" because of an omission and made without any duty to disclose the omission.

The U.S. Chamber of Commerce, trade group Securities Industry and Financial Markets Association and nonprofit Alliance for Automotive Innovation told the Ninth Circuit on Monday that the lower court's ruling essentially erased the "carefully circumscribed limits" of the *Affiliated Ute* decision.

"It allows securities-fraud plaintiffs to avoid their obligation to prove reliance even when their claims are ultimately premised not on the defendant's silence in the face of a freestanding duty to disclose, but rather the defendant's allegedly misleading statements," the three groups said.

Their concerns about the case are shared with a group of individuals that consists of former SEC general counsel Brian G. Cartwright, former SEC commissioner Aulana L. Peters, former SEC deputy general counsel Andrew N. Vollmer, and four law professors, who all filed their own amicus brief on Monday.

According to their motion, the district court's holding extends the *Affiliated Ute* presumption of reliance "far beyond its facts" and stretches liability for certain securities claims "far beyond its 'present boundaries.'"

The ruling at issue came from U.S. District Judge Charles R. Breyer in September, when he denied Volkswagen's motion for summary judgment on securities fraud claims alleging it failed to disclose in

bond offering documents the secret installation of defeat devices in its "clean diesel" line of cars that would mask unlawfully high emissions.

Volkswagen had argued that neither the lead plaintiff pension fund behind the claims nor its investment adviser ever read the May 2014 offering memorandum that purportedly steered them wrong in their bond-purchasing decision. Judge Breyer responded that the "heart of the case" was Volkswagen's omission of its use of defeat devices, which was "tethered" to affirmative statements in its bond offering documents about exposure to environmental regulations.

"Having reviewed the record and — once more — the relevant case law, the court concludes that this case is best characterized as 'primarily a nondisclosure case,' as opposed to a 'positive misrepresentation case,'" Judge Breyer said in September. "As a result, plaintiff is entitled to a presumption of reliance under *Affiliated Ute Citizens of Utah v. United States* and need not prove that it or its investment manager actually relied on the statements made in the bond offering memorandum."

Volkswagen sought reconsideration of the ruling, or alternatively an interlocutory appeal, on the contention that the Supreme Court's *Affiliated Ute* decision created a narrow presumption of reliance for securities cases where defendants breached their duty to disclose material facts, while securities claims based on false or misleading statements are left to a "fraud on the market" presumption of reliance created under *Basic Inc. v. Levinson*.

To apply the *Affiliated Ute* decision, presumption in a dispute that involves both misstatements and omissions, and where Volkswagen did not owe a fiduciary duty of disclosure to the bondholders, is a misreading of court precedent, the automaker has argued in its bid for a Ninth Circuit review of the case.

In their amicus brief, the three business organizations argued that Judge Breyer's decision would likely lead to a significant increase in costly securities fraud class actions, as it would allow plaintiffs to get around the need to prove reliance on misleading statements by characterizing their claims as being focused on corresponding omissions, as is the case with the Volkswagen suit.

"By effectively eliminating the reliance requirement, the district court's expansion of *Affiliated Ute* will make class certification a near certainty in such actions while simultaneously depriving defendants of their rights to an otherwise-available defense," the three groups said. "The order will only further embolden plaintiffs to bring suit and extort settlements with the threat of speculative, yet potentially disastrous, class-wide damage awards."

The group of individual amici said in their brief that *Affiliated Ute* presumption is only to be applied to "pure omissions" cases and that the Supreme Court expressly cautioned that its holding shouldn't extend to cases with different fact patterns. In the Volkswagen bondholder case, the pension fund plaintiffs are sophisticated investors, unlike the members of the Native American tribe in *Affiliated Ute*.

"Whatever *Ute* means, it cannot, consistent with governing Supreme Court direction, apply to the most sophisticated of all investors to grant them the maximally powerful tool of an irrebuttable presumption of reliance because unsophisticated tribe members might have received that protection in *Ute*," the individual amici said.

"This amicus support confirms the importance of the securities law issues raised by Volkswagen's petition," Robert Giuffra, an attorney for the automaker, told Law360 on Tuesday evening.

Counsel for the bondholders and the amici did not immediately respond to requests for comment Tuesday evening.

The bondholders are represented by Ian D. Berg, Takeo A. Kellar and Mitchell M.Z. Twersky of Abraham Fruchter & Twersky LLP.

Volkswagen is represented by Robert J. Giuffra, Sharon L. Nelles, Suhana S. Han, William H. Wagener and Laura Kabler Oswell of Sullivan & Cromwell LLP.

The Chamber of Commerce is represented by Deanne E. Maynard, Jordan Eth, Mark R. S. Foster and James R. Sigel of Morrison & Foerster LLP and its own Steven P. Lehotsky and Janet Galeria. SIFMA is represented by its own Kevin Carroll. AAI is represented by its own Charles Haake.

The law professors and former SEC officials are represented by Gideon A. Schor of Wilson Sonsini Goodrich & Rosati PC and Joseph A. Grundfest of Stanford Law School.

The appellate case is PRGERS v. Volkswagen AG et al, case number 20-80026, in the U.S. Court of Appeals for the Ninth Circuit. The MDL is In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation, case number 3:15-md-02672, in the U.S. District Court for the Northern District of California.

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