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9th Circ. Mulls VW Intervening In Fight For Jones Day Report

By **Lauren Berg**

Law360 (October 21, 2021, 7:34 PM EDT) -- A Ninth Circuit judge questioned when a third party must intervene in a suit involving its interests, indicating during oral arguments Thursday that Volkswagen was timely in its bid for a say on whether the government should release an internal VW investigation conducted by Jones Day.

During remote arguments for **Volkswagen's appeal**, U.S. Circuit Judge John B. Owens said Ninth Circuit precedent states that a third party doesn't have to intervene as soon as it becomes aware of a lawsuit involving its interests but can timely jump in when it knows its interests won't be adequately represented.

The judge appeared to question why a California district court determined that Volkswagen was untimely in its move to intervene in Loyola Marymount University professor Lawrence Kalbers' Freedom of Information Act lawsuit over the potential release of Jones Day's findings on the carmaker's internal investigation into the 2015 emissions-cheating scandal.

Kalbers' attorney, Daniel Jacobs of Enestein Pham & Glass LLP, argued that Volkswagen should have intervened when it learned about the lawsuit, saying third parties can't expect the government in FOIA cases to represent their private interests.

"Volkswagen has no reason to believe the DOJ will protect its interests," Jacobs said, noting that the government has a duty to protect public interests.

But Judge Owens said he was "puzzled" by that argument, saying Ninth Circuit law indicates that a third party should intervene when it believes its interests won't be represented.

Kalbers' 2018 lawsuit aims to get the U.S. Department of Justice to publicly release Jones Day's findings — which have been kept under wraps — on how the "clean diesel" emissions-cheating scandal **took shape**, as well as reports from Volkswagen's **independent compliance monitor**.

Kalbers, an associate dean of faculty and academic initiatives at Loyola Marymount's College of Business Administration who has been researching Volkswagen's "clean diesel" emissions cheating scandal, sued after the DOJ's Environment and Natural Resources Division denied his initial FOIA request because the documents he requested fell under an exemption. That exemption shields the release of any documents "compiled for law enforcement purposes."

Volkswagen tried to intervene in the case, but last October U.S. District Judge Fernando M. Olguin denied the bid as untimely and ordered the DOJ to search for and produce all "factual evidence" that the firm gave to the DOJ in connection with the government's criminal case against the company.

Judge Olguin held that Volkswagen missed the window to get in on Kalbers' October 2018 lawsuit, flatly rejecting claims from Volkswagen's attorneys at Sullivan & Cromwell LLP that the company only received "formal" notice of this lawsuit via a Sept. 4, 2019, letter the DOJ sent Volkswagen.

On Thursday, however, Robert J. Giuffra Jr. of Sullivan & Cromwell LLP, an attorney for Volkswagen, asked the appellate panel to find that the motion was timely and to send it back to Judge Olguin for reconsideration. He argued that when Kalbers filed his lawsuit, the government told Volkswagen it didn't need to intervene until they received formal notice of the suit from the DOJ.

Giuffra said third parties don't have to intervene in cases right from the beginning, noting that Volkswagen could rely upon the government to protect its interests.

Following the arguments, the panel took the matter under submission.

Counsel for the parties declined to comment Thursday.

Volkswagen **hired Jones Day** to conduct an internal investigation shortly after the U.S. Environmental Protection Agency and the California Air Resources Board issued the September 2015 **notices of violation** blasting Volkswagen for rigging thousands of "clean diesel" vehicles with special software, or defeat devices, to fool regulators' tests and emit pollutants beyond federal limits.

Volkswagen has since paid more than \$25 billion in fines, penalties and settlements in the U.S. over the emissions scandal. That includes an overall **\$14.7 billion deal** in 2016 with federal and state regulators, including the DOJ and the EPA. The bulk of that deal — \$10 billion — went toward compensating Volkswagen customers for claims tied to the 2.0-liter TDI "clean diesel" vehicles. Volkswagen in 2017 cut an approximately **\$1.2 billion deal** to settle civil claims tied to its 3.0-liter TDI vehicles.

Kalbers said the factual evidence that Jones Day presented to the DOJ in connection with its **criminal investigation** apparently was deemed valuable to the government. In the plea agreement, the DOJ expressly acknowledged the extensive evidence provided to it, deeming the company's "cooperation" worthy of a discount of approximately \$3.4 billion off its criminal sentence — or 20% off the bottom of the U.S. Sentencing Guidelines fine range — which led to a much-reduced **criminal fine of \$2.8 billion**, according to Kalbers.

"Because the government's cases never went to trial, little evidence of Volkswagen's fraud has reached the public domain," Kalbers said. "The still-secret Justice Department records remain of considerable interest both to researchers and the general public, including in Southern California which bore the greatest impact of Volkswagen's crimes."

U.S. Circuit Judges Consuelo M. Callahan, John B. Owens and Danielle J. Forrest sat on the panel for the Ninth Circuit.

Kalbers is represented by Daniel Jacobs of Enenstein Pham & Glass LLP.

VW is represented by Robert J. Giuffra Jr., Amanda F. Davidoff, Michael Steinberg, Sharon L. Nelles, Suhana S. Han, Andrew J. Finn and Laura Kabler Oswell of Sullivan & Cromwell LLP.

The case is Lawrence P. Kalbers v. Volkswagen AG, case number 20-56316, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Linda Chiem, Brandon Lowrey, Keith Goldberg, Juan Carlos Rodriguez and Emily Field. Editing by Orlando Lorenzo.