

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF WEST VIRGINIA
ELKINS DIVISION

ROBERT M. JUDY, Individually
and on behalf of others similarly situation,

Plaintiffs,

v.

VOLKSWAGEN GROUP OF AMERICA,
INC., a New Jersey Corporation,

Defendant.

CLASS ACTION COMPLAINT

Civil Action No. 2:15-CV-74 (Bailey)
Electronically filed: 10/05/2015

JURY TRIAL DEMANDED

Plaintiff, Robert M. Judy (“Plaintiff”), individually and on behalf of all others similarly situated (the “Class”), allege the following against Volkswagen Group of America, Inc. (“Volkswagen”):

I. FACTUAL ALLEGATIONS

1. The Clean Air Act has strict emissions standards for vehicles. All vehicle manufacturers must certify to the Environmental Protection Agency (“EPA”) that the vehicles sold in the United States meet applicable federal emission standards to control air pollution. Indeed, every vehicle sold in the United States must be covered by an EPA issued certificate of conformity.

2. Diesel cars were once very popular in the United States. However, by the 1970s and early 1980s, diesel passenger cars virtually disappeared because they could not meet the tougher emissions standards required by the federal Clean Air Act and the laws of many states.

3. In 2009, Volkswagen introduced and marketed a new line of diesel cars powered by its TDI (Turbo-charged Direct Injection) engine. Volkswagen called this engine “CleanDiesel.”

4. Volkswagen claimed to consumers that the new TDI engine provided improved power and fuel efficiency while still meeting the tougher emissions standards.

5. Volkswagen charged several more thousand dollars for the CleanDiesel engine upgrade. For example, a comparison between the 2015 Volkswagen Jetta base S model and the same model-year Jetta with the TDI S CleanDiesel engine shows that Volkswagen charged a premium of \$2,860 for the CleanDiesel model. Price comparisons of other models and trim packages reveal that consumers paid even greater premiums for the CleanDiesel technology.

6. Volkswagen's "CleanDiesel" engine, however, was a complete sham. The TDI engine was not cleaner. Rather, Volkswagen developed and installed sophisticated software that allowed the engines to detect when it was undergoing an emission test ("deceptive software"). Once detected, the software would activate full emissions controls on the engine thereby allowing it to pass the test. If the engine was not undergoing an emission test, the vehicle operator enjoyed greater power and fuel efficiency, but the vehicle emitted nitrogen oxides (NO_x) at up to 40 times the standard allowed under United States laws and regulations.

7. According to EPA filings, Volkswagen installed its deceptive software in the following diesel models ("Affected Vehicles"): MY 2009-2015 VW Jetta; MY 2009-2014 Jetta Sportwagen; MY 2012-2015 VW Beetle; MY 2012-2015 VW Beetle Convertible; MY 2010-2015 VW Golf; MY 2015 Golf Sportwagen; MY 2012-2015 VW Passat; and MY 2010-2015 Audi A3. Additional discovery may reveal other model years and models contained the evasive software. The sole purpose of the installed software on the CleanDiesel engines was to evade the EPA's emissions standards.

8. NO_x pollution contributes to nitrogen dioxide, ground-level ozone, and fine particulate matter. Ozone and particulate matter exposure have been linked to premature death

due to respiratory-related or cardiovascular-related effects. People with pre-existing conditions, children and the elderly are at a greater risk from exposure to these pollutants.

9. Volkswagen's deceptive software was uncovered in large part as a result of a West Virginia University study. Volkswagen first reacted by asserting that the WVU study was flawed. Recently, however, Volkswagen has admitted that its CleanDiesel engine used deceptive software designed to make it appear as if the vehicle passed the EPA emissions tests.

10. Without using deceptive software to sidestep the EPA and state regulations on emissions, Volkswagen would have been unable to sell a single vehicle that was powered by the CleanDiesel engine in West Virginia or any other state.

11. The EPA has ordered Volkswagen to recall the Affected Vehicles and repair them so that they comply with EPA emission standards. However, the Affected Vehicles – once repaired – will no longer perform the same way. Specifically, their horsepower and fuel efficiency will be affected. Therefore, even if Volkswagen is able to repair the Affected Vehicles and bring them in compliance with EPA emission standards, Plaintiff and other class members will suffer actual harm and damages because their vehicles will no longer perform as they did when they were purchased and will not perform as advertised. As a result, Plaintiff and class members have suffered a diminution in value of every Affected Vehicle and it will cause owners of Affected Vehicles to pay more for fuel while using their vehicles.

12. Volkswagen's profound deceptive practices violate the federal Clean Air Act and corresponding EPA rules and regulations, and they violate West Virginia statutory and common law including the West Virginia Consumer Credit and Protection Act. Volkswagen's conduct breaches implied warranties under West Virginia law, and further amounts to fraud. Plaintiff

brings this action on behalf of himself and a proposed West Virginia class to obtain both actual and punitive damages, and to enjoin Volkswagen from continuing to deceive consumers.

II. JURISDICTION AND VENUE

13. Jurisdiction is proper in this Court pursuant to the Class Action Fairness Act, 28 U.S.C. §1332(d), because there are at least 100 members in the proposed statewide Class; the amount in controversy exceeds \$5,000,000, exclusive of interest and costs; and diversity exists because Plaintiff and the members of the proposed Class are citizens of West Virginia, whereas Volkswagen is organized under the laws of New Jersey with a principal place of business in Virginia.

14. Venue is proper in this Court and in this District pursuant to 28 U.S.C. §1391(a) because a substantial part of the events or omissions giving rise to these claims occurred in this District and West Virginia University (the entity that uncovered Volkswagen's sham) is located in this District. Volkswagen has caused harm to Class Members in this District. Plaintiff resides in this District and purchased his Affected Vehicle in this District. Volkswagen has marketed, advertised, sold and leased affected vehicle in this District.

III. PARTIES

15. Plaintiff, Robert M. Judy, is a citizen of West Virginia and a resident of Davis, which is in Tucker County, West Virginia. Plaintiff owns a 2011 Volkswagen Station with the CleanDiesel engine, VIN 3VWPL7AJXBM626965. He has been injured as a result of Volkswagen's unlawful conduct.

16. Defendant Volkswagen Group of America, Inc. is a New Jersey corporation with its headquarters and principal place of business located at 2200 Ferdinand, Porsche Drive, Herndon, Virginia.

IV. APPLICABLE STATUTE OF LIMITATIONS HAVE BEEN TOLLED

17. Plaintiff and Class Members had no way of knowing that Volkswagen had installed deceptive software in their vehicles. The very purpose of the deceptive software was to get around the EPA emission standards. Volkswagen was clearly intent on expressly concealing its conduct from regulators and consumers. Thus, clearly the tolling statute is implicated.

18. Volkswagen knowingly and actively concealed its deceptive software throughout the time period relevant to this Action.

19. Upon information and belief, it took extensive testing by a number of entities, including West Virginia University, to uncover Volkswagen's widespread deceptive conduct. Plaintiff and the members of the proposed class could not have discovered through the exercise of reasonable diligence that Volkswagen was concealing the conduct described herein and was misrepresenting the Company's true position related to the emission qualities of its vehicles.

20. Volkswagen deliberately misrepresented that the vehicles with the CleanDiesel engines, such as Plaintiff's, complied with EPA emission standards. In fact, Volkswagen employed the deceptive software to cheat the EPA and consumers like the Plaintiff and fellow Class Members throughout the time period relevant to this action. It routinely represented that the vehicles complied with federal and state emission standards, and that it was a reputable manufacturer whose representations could be trusted.

21. Because of Volkswagen's conduct based in concealing the truth, all applicable statutes of limitations have been tolled by operation of the discovery rule.

22. Volkswagen deliberately concealed the actual quality of emissions from the CleanDiesel engines in vehicles like the Plaintiff's and Class Members.

23. Volkswagen had a continuous duty to disclose to Plaintiff, Class Members and the EPA the actual quality of emissions from the Affected Vehicles. It also had a continuous duty to admit that it had engaged in an illegal scheme to defeat emissions testing and thereby evade EPA emissions standards.

24. As a consequence, Volkswagen is estopped from relying on any statutes of limitations in defense of this Action.

V. CLASS ALLEGATIONS

25. Plaintiff brings this action as a class action under Federal Rule of Civil Procedure 23(a), 23(b)(2), and 23(b)(3), on behalf of himself and all others similarly situated. Plaintiff seeks to represent a class (the "Class") defined as follows: All persons or entities in West Virginia and surrounding states who are current or former owners and/or lessees of an Affected Vehicle. Affected Vehicles include those vehicles listed in paragraph 7 herein. Plaintiff reserves the right to amend the definition of the Class if discovery or additional investigation reveals that the Class should be expanded or modified.

26. Excluded from the Class are persons who have personal injury claims resulting from the deceptive software in the CleanDiesel system. Also excluded is any person who makes a timely election to be excluded from the Class as well as the Judge to whom this case is assigned and his/her immediate family.

27. Certification of Plaintiff's claims for class-wide treatment is appropriate because Plaintiff can prove the elements of her claims on a class-wide basis using the same evidence as he would use to prove those elements on an individual action alleging the same claims.

28. The requirements of Federal Rule of Civil Procedure 23 are met.

a. Numerosity: The members of the Class are so numerous that individual joinder of all Class Members is not practicable. Plaintiff does not know the exact number of Class Members but upon information and belief believes that the size of the class is in the thousands. Class Members are identifiable from information and records within Volkswagen's possession, custody and control. Class members, once identified, may be notified of the pendency of this action by recognized, Court-approved notice dissemination methods.

b. Commonality and Predominance: This action involves common questions of law and fact, which predominate over any questions affecting the individual members of the Class. These include, but are not limited to, the following:

1. Did Volkswagen engage in the conduct alleged herein?
2. Did Volkswagen design, advertise, market, distribute, lease, sell or otherwise place Affected Vehicles into the stream of commerce in the United States?
3. Does the CleanDiesel engine system in the vehicles identified herein contain a defect that fails to comply with EPA requirements?
4. Can the CleanDiesel engine be made to comply with EPA standards without affecting the performance and/or efficiency of the vehicles?
5. Did Volkswagen know about the defect and if so for how long?
6. Does Volkswagen's conduct violate consumer protection statutes, warranty laws, and other laws as asserted below?
7. Did the Plaintiff and Class Members overpay for their vehicles?
8. What relief are the Plaintiff and Class Members entitled to?

c. Typicality: Plaintiff's claims are based on the same legal theories as the claims of other Class Members. All were comparably injured by Volkswagen's wrongful conduct as described herein.

d. Adequacy: Neither Plaintiff nor his counsel has interests that conflict with the interests of the other Class members. Plaintiff is an adequate Class representative as his experienced counsel.

e. Declaratory and Injunctive Relief: Volkswagen has acted or refused to act on grounds generally applicable to Plaintiff and to the other members of the Class, thereby making appropriate final injunctive relief and declaratory relief, as described below, with respect to the Class as a whole.

f. Superiority: A class action is the superior method for the fair and efficient adjudication of this controversy because, among other things: it is not practicable for members of the class to prosecute individual actions; a class action will reduce or eliminate the possibility of repetitious and redundant litigation, or of inconsistent or contradictory judgments; and a class action will enable claims to be handled in an orderly, efficient and expeditious manner.

VI. CLAIMS

Count I – Breach of Implied Warranty of Merchantability

29. Plaintiff incorporates by reference all preceding paragraphs of this Complaint as if fully set forth herein.

30. Plaintiff brings this claim on behalf of himself and on behalf of the Class.

31. Volkswagen is and was at all relevant times a "merchant" with respect to motor vehicles under West Virginia Code §§ 46-2-104(1) and 314(1).

32. The Affective Vehicles are and were at all relevant times “goods” within the meaning of West Virginia Code §§ 46-2-105(1) and 314(2).

33. Pursuant to West Virginia Code § 46-2-314, Volkswagen implicitly warranted that the vehicles it sold to the Plaintiff and Class Members were in a merchantable condition and fit for the ordinary purpose for which cars are used.

34. The Affective Vehicles when sold and at all relevant times were not in a merchantable condition and are not fit for the ordinary purpose for which cars are used for the reasons specified herein.

35. Volkswagen is fully on notice of the relevant defects in Plaintiff’s vehicle and in the vehicles of the Class Members by its own knowledge of the issue, by its development of the deceptive software, by the WVU study, by communications from the EPA, by the instant Complaint, and by the numerous news stories and press releases on this topic.

36. Privity of contract is not required in this case because Plaintiff and Class Members are intended third-party beneficiaries of contracts between the Defendant and its dealers. Notably, Plaintiff and Class members are the intended beneficiaries of Volkswagen’s implied warranties with their dealers. Any warranty agreements were intended to benefit the ultimate consumers, such as Plaintiff and fellow Class Members.

37. As a direct and proximate result of Volkswagen’s breach of warranties of merchantability, Plaintiff and the Class have been damaged in an amount to be proven at trial.

Count II – Violation of West Virginia Consumer Credit and Protection Act

38. Plaintiff incorporates by reference all preceding paragraphs of this Complaint as if fully set forth herein.

39. Plaintiff brings this claim individually and on behalf of the Class.

40. Plaintiff brings this claim under the West Virginia Consumer Credit and Protection Act (“WVCCPA”), which makes it unlawful to engage in any “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.” WV Code § 46A-6-104.

41. When Volkswagen employed the deceptive software in the CleanDiesel engines to avoid the EPA emission tests, Volkswagen engaged in deceptive business practices prohibited by the WVCCPA, including but not limited to:

a. representing that the Affected Vehicles have characteristics, uses, benefits, and qualities which they do not have;

b. representing that the Affected Vehicles were of a particular standard, quality, and grade when they were and are not; and

c. advertising the Affected Vehicles with the intent not to sell them as advertised.

42. As a direct and proximate result of Volkswagen’s violations of the WVCCPA, Plaintiff and the Class Members have suffered actual damages. As a result, Plaintiff seeks monetary relief against Volkswagen as allowed under the WVCCPA.

44. Plaintiff also seeks punitive damages against Volkswagen because Volkswagen carried out outrageous conduct with willful and conscious disregard of the rights of others. Volkswagen intentionally and willfully misrepresented the “clean” emissions of the Affected Vehicles and concealed material facts that only Volkswagen knew. Volkswagen’s unlawful conduct constitutes malice, oppression, and fraud warranting punitive damages.

45. Plaintiff further seeks an order enjoining Volkswagen's unfair or deceptive acts or practices, restitution, punitive damages, costs of Court, and attorney's fees under W. Va. Code § 46A-5-101, et seq., and any other just and proper relief available under the WVCCPA.

Count III – Fraud by Concealment

46. Plaintiff incorporates by reference all preceding paragraphs of this Complaint as if fully set forth herein.

47. Plaintiff brings this claim individually and on behalf of the Class.

48. Volkswagen intentionally concealed that the CleanDiesel engine systems were not EPA-compliant by using deceptive software to avoid the EPA emissions testing.

49. Volkswagen intentionally concealed information from Plaintiff and the Class that was highly relevant to their purchasing decision.

50. Volkswagen through its advertising campaigns and other forms of communication affirmatively represented that the Affected Vehicles had no significant defects, complied with all EPA regulations and would perform and operate properly.

51. When made, Volkswagen knew that these representations were false.

52. The conduct described herein was material because if it had been disclosed Plaintiff and the Class Members would not have bought or leased the Affective Vehicles, or would not have bought or leased those Affected Vehicles at the prices they paid.

53. Plaintiff and the other Class Members relied on Volkswagen's advertisements, written communications and reputation when purchasing the Affected Vehicles.

54. The Plaintiff and Class members' reliance was reasonably foreseeable to Volkswagen. Indeed, the advertisements and additional communications to Plaintiff and Class Members from Volkswagen emphasized greater power and fuel efficiency while also meeting the

EPA emissions standards. Volkswagen knew that these claims were material to Plaintiff and the Class members and that is why it spent millions on advertising campaigns to talk about these features.

54. Plaintiff and Class members were intentionally led to believe that they had paid for and received clean diesel vehicles, when in reality their “CleanDiesel” vehicles used a deceptive software system to cheat the EPA and make them appear clean when those vehicles were and are not at all.

55. Given Volkswagen’s fraudulent conduct, Volkswagen is liable to Plaintiff and Class Members for damages in an amount to be proven at trial. Additionally, because Volkswagen’s actions were wanton, malicious, oppressive, reckless, deliberate, and with full intent to defraud the Plaintiff and Class Members, Volkswagen’s conduct warrants punitive damages in an amount sufficient to deter such conduct in the future, as determined at trial.

VII. REQUEST FOR RELIEF

Plaintiff, individually and on behalf of members of the Class, respectfully request that the Court enter judgment in their favor and against Volkswagen as follows:

- A. Certification of the proposed Class, and designation of Plaintiff as the named representative of the Class, and designating the undersigned as Counsel for the Class;
- B. Declaration that Volkswagen is financially responsible for notifying all Class members about the defective nature of the Affected Vehicles;
- C. Injunctive relief in the form of a recall or free replacement program;
- D. Costs, restitution, damages, including punitive damages, and disgorgement in an amount to be determined at trial;

- E. An order requiring Volkswagen to pay both pre- and post-judgment interest on any amounts awarded;
- F. An award of costs and attorneys' fees; and
- G. Such other or further relief as may be appropriate.

VIII. DEMAND FOR JURY TRIAL

Plaintiff demands a jury trial for all claims so triable.

ROBERT M. JUDY, Individually and
on behalf of others similarly situated,

By Counsel,

/s/ Carrie Goodwin Fenwick
Carrie Goodwin Fenwick (#7164)
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CIVIL COVER SHEET

2:15-cv-74

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

ROBERT M. JUDY, Individually and on behalf of other similarly situated

(b) County of Residence of First Listed Plaintiff Tucker County, WV (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number) Carrie Goodwin Fenwick, Esquire - Goodwin & Goodwin, LLP 300 Summers Street, Suite 1500; Charleston, WV 25301 304-346-7000

DEFENDANTS

VOLKSWAGEN GROUP OF AMERICA, INC.

County of Residence of First Listed Defendant Loudoun County, Virginia (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship and business location (Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation).

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Large table with categories: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District, 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 28 U.S.C. § 1332 (d) Brief description of cause:

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE 10/05/2015 SIGNATURE OF ATTORNEY OF RECORD /s/ Carrie Goodwin Fenwick (#7164)

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE