

QUESTIONS Raised re VW Litigation by Brazos County

What's the law that allows this claim?

> Texas Water Code §7.351(a) – see attached Summary for details.

What's the liability theory?

> Texas Water Code §7.101 makes it illegal to violate the Texas Clean Air Act (Texas Health and Safety Code Chapter 382) – see attached Summary.

Violation occurs when vehicle operates or resides in Brazos County while the defeat device created and installed by VW deactivates its emissions controls. The action of the defeat device occurs in Brazos County and violates TCEQ (Texas Commission on Environmental Quality) rules found at 30 TEX. ADMIN. CODE § 114.20(a)(b) and (c) because it makes inoperable the emissions control devices.

Defenses?

> None on the facts. VW has publicly confessed its intentional violation of our law.

> VW will throw up legal arguments including preemption and res judicata once it settles with the EPA. The settlement is to be formally filed with the Federal MDL Court on June 21, 2016. Its terms will not be publicly available until that date.

Timetable?

> Sooner the better. The State sued two American companies, Volkswagen Group of America, Inc. and Audi of America, LLC, that distribute the illegal diesels. The State has argued that the counties cannot sue those companies because the State has already done so. In order to avoid that conflict, Dallas County has not sued those two American companies. Dallas County has sued the four German corporations that actually designed and manufactured the defeat device.¹

The State can today sue those German entities and then argue that other counties cannot sue them because the State has already done so. Brazos County would be wise to take action before that happens. Avoiding this problem was extremely important to Judge Russell Roden, Chief of the Civil Division of the

¹ VW AG, Audi AG, Dr. Ing. h.c. F. Porsche AG, Bosch GmbH. Dallas has also sued two wholly owned American subsidiaries of Porsche and Bosch.

Dallas County Criminal District Attorney's Office, and he directed me to file suit immediately after he had secured Commissioner's Court authority to file suit and we did so on that same day.

[Any risk to county of counter-claim or other liability if they bring a claim?](#)

> NO. There is no counter-claim that can be brought but to reassure County officials and to demonstrate the strength of my confidence in my judgment on the issue, I include in my contract an indemnity agreement for the County protecting the County on this issue.

[What kind of work will be required of the county to support the litigation?](#)

> The Brazos County Attorney or his designee, will need to supervise my work by receiving reports from me on activity in prosecuting the claim and questioning me as needed about the prosecution and authorizing the filing of pleadings as needed (I would prepare and submit any pleadings with an explanation for the need) and the County Attorney eventually would need to evaluate and make a recommendation to the Commissioners Court on any settlement proposal.

It is important that control over the litigation be in the hands of the District Attorney. We want control to remain in the hands of the County – special counsel assists by carrying out the prosecution but executive decisions need to remain with the County.

[Will Brazos County be on the hook for any expenses?](#)

> NO. Our contract specifically provides that Constant will advance and pay all expenses and that if there is no recovery, the County owes nothing. This includes if the County decides to dismiss the suit and make no recovery. Our contract also provides that fees and expenses together will not exceed 35% of the recovery. Fees are measured by the hours worked with 35% as the cap and if those fees actually get to the point that they equal 35% of the recovery, then no expenses would be reimbursed. Any reimbursement of expenses will come only from the perpetrators' funds paid in settlement. No County funds will ever be expended or at risk.

Who gets deposed?

> No County Official will be deposed. This is like a criminal prosecution for violation of the law (say a speeding ticket) except it is a civil enforcement case where the offense is not a crime and the penalty is financial only. The County Official has no information on the issues in the case.

Where will suit get filed?

> Brazos County District Court. It will then be transferred for pretrial proceedings to the MDL Pretrial Court that is the 353rd Judicial District Court of Travis County, Judge Tim Sulak presiding. Once pretrial matters are completed, the case is returned to Brazos County for trial.

What does it cost the County?

> NOTHING. The County pays nothing to the lawyer unless and until there is a recovery of funds from the perpetrators – the fee is entirely contingent on the lawyer's success and comes entirely out of that recovery and never from the County.

What happens if Brazos County makes no recovery, does it still owe the lawyer?

> NO.

How and when does the lawyer get paid? How much does he get paid?

The fee is contingent on winning and is dictated by Subchapter C of Chapter 2254 of the Texas Government Code. If there is no recovery, Brazos County owes nothing. Brazos County never owes any amount and pays the lawyer nothing and expends no money as long as the litigation continues. If Brazos County does make a recovery, then out of the funds paid by the perpetrators and only from those funds and never from the County's budget, the lawyer will be paid a fee measured by the number of hours worked. Subchapter C of Chapter 2254 of the Texas Government Code provides that a fee payable only if there is success, is measured by the number of hours worked times a multiple or a percentage not to exceed 35% whichever is LESSER (so the fee can never be more than 35% no matter how many hours are worked). Every county contract so far (13 of them) sets the hourly rate at \$900 and the multiplier at 4 (every county has followed this pattern set by Harris County and approved by the Texas Comptroller of Public Accounts). The high rate compensates for the fact the counsel gets paid nothing while the work is being done, advances all costs, risks making no recovery of those expenses and no fee at all ever.

SUMMARY
Brazos County v. VW

Here is the basic outline:

1. AUTHORITY TO SUE.

County is empowered by §7.351 (“Civil Suits”) of the Texas Water Code to institute a civil suit to recover a civil penalty against persons committing violations of the Texas Clean Air Act (Chapter 382 of the Texas Health and Safety Code) and the Texas Water Code.

Tex. Water Code Ann. § 7.351:

“(a) If it appears that a violation or threat of violation of Chapter . . . 382, Health and Safety Code, . . . or a rule adopted or an order or a permit issued under those chapters or provisions has occurred or is occurring in the jurisdiction of a local government, **the local government . . . may institute a civil suit . . . in the same manner as the commission in a district court by its own attorney** for the injunctive relief or civil penalty, or both, as authorized by this chapter against the person who committed, is committing, or is threatening to commit the violation.”

2. DIVISION OF PENALTY RECOVERED/ HALF TO COUNTY

Tex. Water Code Ann. § 7.107 – before September 1, 2015:

Texas Water Code §7.107 “Division of Civil Penalty” provides that “a civil penalty recovered in a suit **brought** under this subchapter **by a local government** shall be equally divided between (1) the state; and (2) the local government **that brought the suit.**”²

If the County does not bring suit, it makes no recovery and all of the penalty that would have been distributed to County goes instead into the General Revenue fund of the State.

3. PENALTY. Tex. Water Code §7.102

This section provides that violators “shall be assessed for each violation a civil penalty not less than \$50 nor greater than \$5,000 for each day of each violation as the court or jury considers proper. Each day of continuing violation is a separate violation.”

² H.B. 1794, 2015 Legislature, amended the statute to cap the split at half of the first \$4.3 million but Section 3 of the Act provides:

“SECTION 3. The changes in law made by this Act apply only to a violation that occurs on or after the effective date of this Act. A violation that occurs before the effective date of this Act is governed by the law in effect on the date the violation occurred, and the former law is continued in effect for that purpose.”

“SECTION 4. This Act takes effect September 1, 2015.”

4. LAW BEING VIOLATED DAILY BY VW.

The Texas Water Code §7.101 and the Texas Health and Safety Code §382.085 prohibit violation of statutes and rules within the jurisdiction of the Texas Commission on Environmental Quality [TCEQ], including violations of the Texas Clean Air Act or violations of rules adopted by TCEQ.

5. VW ADMITS IT IS VIOLATING OUR LAW DAILY.

Volkswagen has confessed publicly that it intentionally violated and is continuing to violate these statutes and rules every day. These violations have been occurring daily in Brazos County since 2008.

Tex. Water Code § 7.102: “Each day of a continuing violation is a separate violation.”.

Each day each illegal diesel operating in Brazos County creates a separate civil penalty that the County is entitled to recover to stop further violations.

6. SUITS ALREADY FILED.

These Counties have already filed suit:

1. Bexar County
2. Dallas County
3. El Paso County
4. Ector County
5. Fort Bend County
6. Harris County
7. Hunt County
8. Montgomery County
9. Nueces County
10. Tarrant County
11. Travis County
12. Victoria County
13. Webb County

7. Anthony Constant, Constant Law Firm, Corpus Christi, Texas currently represents the following counties in the civil law enforcement action against VW:

Dallas County
Nueces County
Victoria County
Webb County

Calculation of the Minimum Penalty Allowed by Law Due

Brazos County

| | Total Registered 2.0 L VW + Audi Diesel 2009-2015 | Average # cars / year Total Registered ÷ 7 | Total Violations Average # diesels x 365 days x 7 years (2,555 days) | \$50 Minimum penalty x Total Violations | County's 50% share of \$50 Minimum Penalty |
|--------|---|---|--|---|--|
| Brazos | 568 | 81 | 206,955 | \$10.3 Million | \$5.15 Million |

Texas Water Code §7.107 provides that for violations that occur before September 1, 2015, the civil penalty recovered **in a suit brought by a local government** shall be equally divided between the state and **the local government that brought the suit.**

Texas Water Code §7.102 provides that a person who permits a violation of the Texas Clean Air Act “shall be assessed for each violation a civil penalty of not less than \$50 nor greater than \$5,000 for each day of each violation as the court or jury consider proper.” . . . “Each day of a continuing violation is a separate violation.”