

High Court Urged To Nix \$9.2M Attys' Fee In VW Settlement

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Law360, Los Angeles (July 25, 2014, 6:27 PM ET) -- A class member in a consolidated suit against [Volkswagen](#) of America Inc. over leaky sunroofs told the [U.S. Supreme Court](#) that the Third Circuit and a magistrate judge shouldn't have approved a \$9.2 million attorneys' fee award, according to a filing made available Friday.

In a petition for a writ of certiorari, Peter Braverman told the high court on July 18 that the Third Circuit shouldn't have affirmed the magistrate judge's reapproval of class counsel's fee award in the \$69.2 million settlement because she didn't have the authority to do so under Article III.

Braverman, who was not a party to the settlement, had previously appealed the magistrate judge's refusal to allow him to intervene in the proceedings on remand and also challenged the attorneys' fee award, but the Third Circuit rejected his arguments, saying he was unable to show that the magistrate judge had erred in any way.

The objector is now arguing that the Supreme Court has never addressed whether federal law authorizing non-Article III magistrate judges to issue final judgments in civil cases assigned by the Constitution to Article III decision makers upon consent of the parties is consistent with Article III.

"This question is especially pertinent in the class-action context, where the consent of the named plaintiffs alone to proceed before a magistrate judge supposedly serves to bar the absent class members from adjudicating their claims before an Article III judge," the petition said.

Class co-counsel Adam Slater of [Mazie Slater Katz & Freeman LLC](#) told Law360 on Friday that they are "confident that the petition will be denied, especially since the objector's attorney admitted in oral argument in the Third Circuit that the issue at the center of the petition was likely waived in the district court."

The two suits in the consolidated case were launched in 2007 against Volkswagen and

several of its divisions over alleged design flaws in the pollen filter gaskets and sunroof drains on a variety of the company's cars between 1997 and 2007.

A settlement was first reached in the case in 2010, but nonparty class members and Volkswagen appealed a magistrate judge's preliminary approval of the deal to the Third Circuit, which then remanded the case over problems with the class structure.

A revised settlement resolved qualms over the class structure, but certain factions of attorneys for plaintiffs in the case remained dissatisfied with a ruling on how fees were calculated.

U.S. Magistrate Judge Patty Shwartz said she would allow a 2.0 lodestar multiplier in determining fees in the case because it was within the limit approved by the Third Circuit, according to court filings.

But some class members [argued](#) in December that a New Jersey judge had improperly relied on federal law to sign off on the fee award — which, according to court records, was calculated by doubling the \$4.6 million lodestar in the case — despite the fact that state law generally limits the amount that lodestar amounts can be multiplied.

The Third Circuit in February [disagreed](#), saying courts are allowed under both federal law and New Jersey law to apply the percentage-of-recovery method in class actions when attorneys' fees are derived from a common fund shared by plaintiffs.

Braverman further argued that, even if the magistrate judge's decision was constitutional, the court should review the Third Circuit's legal error in affirming the judge's reapproval of the fee award over his objection. In setting the amount of attorneys' fees, the judge didn't determine the actual benefit the settlement had for the class, in light of a cy pres provision, according to Braverman.

Bruce H. Nagel of [Nagel Rice LLP](#), which is representing Braverman, told Law360 on Saturday that they "hope the court agrees that these issues need to be addressed."

Attorneys for the Dewey class action plaintiffs didn't immediately respond to requests for comment Friday.

Braverman is represented by Bruce H. Nagel and Andrew I. Pepper of Nagel Rice LLP, with Brian Wolfman serving of counsel.

The Delguercio class action plaintiffs are represented by Adam Slater of Mazie Slater Katz & Freeman LLC. The Dewey class action plaintiffs were represented in the Third Circuit by [Schoengold & Sporn PC](#), and Angelo Genova and Dina Mastellone of [Genova Burns Giantomasi Webster](#).

The case is Peter Braverman v. John M. Dewey et al., case number 14-70, in the Supreme Court of the United States.

--Additional reporting by Kelly Knaub. Editing by Emily Kokoll.