German Federal Court of Justice Does Not Grant Tortious Compensation to Lessees of Diesel Scandal Vehicles a Classification of the Judgments of April 21, 2022 - VII ZR 247/21, VII ZR 285/21 and VII ZR 783/21

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Keywords: Diesel scandal, Dieselskandal, BGH ruling, Volkswagen, (tortious) damages, defeat device, leasing, compensation for use, benefits of use, German tort law, US-German damages calculation differences.

INTRODUCTION

In April 2022, the German Federal Court of Justice (BGH) in Karlsruhe heard three cases brought by the car manufacturer VW concerning so-called diesel scandal cars, i.e. cars that use built-in electronic devices to detect whether the car is being operated on a test stand or on the road and, on the basis of this, electronically regulate or adjust the NO_x emissions, thus using fraudulent methods to simulate lower emissions than are actually present.

In essence, the new ruling is that anyone who leased a car from Volkswagen before the diesel scandal became known will not get their lease payments back.

The judges of the VII Senate, which is responsible for dealing with the diesel scandal, argued that as long as leasing customers were able to use their cars throughout the duration of the lease without any major restrictions, they had received value for the installments they paid - the two offset each other.

The BGH also makes its position clear with its tenor: no fundamental claim for damages in leasing cases.

FACTS IN DETAIL

In the three proceedings, the respective party to the action asserted a claim against the defendant Volkswagen AG (VW) as vehicle and engine manufacturer for (tortious) damages due to the use of an impermissible defeat device.

In the proceedings VII ZR 247/21, the plaintiff concluded a leasing agreement with Volkswagen Leasing GmbH in spring 2010 for a new VW Golf vehicle manufactured by the defendant. Subsequently, it paid the agreed monthly leasing installments until it purchased the vehicle in June 2013.

In the proceedings VII ZR 285/21, the plaintiff concluded a leasing agreement with Volkswagen Leasing GmbH in February/May 2015 for a used motor vehicle of the type VW Tiguan manufactured by the defendant. In accordance with the contract, he subsequently made a one-time payment and monthly payments until he purchased the vehicle in March 2018.

In the proceedings VII ZR 783/21, the plaintiff concluded a lease agreement with Volkswagen Leasing GmbH in December 2011 for a new Seat Ibiza 2.0 TDI vehicle. She made a special down payment and monthly installments, and also spent €1,178.29 on the installation of a threaded chassis. She purchased the vehicle at the beginning of August 2016.

The vehicles each contain a type EA189 diesel engine manufactured by the defendant. At the time the leases were concluded, the engines contained software that recognized the operation of the vehicle on a test bench and in this case resulted in lower nitrogen oxide emissions than in normal operation.

In the lower courts, the parties to the action essentially sought reimbursement of their lease payments less compensation for use, insofar as this is of interest for the appeal proceedings.

PROCESS TO DATE

The actions were partially successful before the respective courts of appeal. The courts of appeal unanimously held that the parties to the action were entitled to reimbursement of their lease payments (in proceedings VII ZR 783/21 plus the expenses for the threaded chassis), taking into account benefits of use. The value of the benefits of use obtained during the leasing period did not correspond to the leasing payments made by the parties to the action, but was to be calculated according to the formula recognized for vehicle purchases[1] , i.e. (according to the courts of appeal in proceedings VII ZR 247/21 and 783/21), or according to the loss in value of the vehicle during the leasing period (according to the court of appeal in proceedings VII ZR 285/21).

$$Advantage\ of\ Use = \frac{Gross\ purchase\ price\ \cdot\ Distance\ driven\ (since\ acquisition)}{Expected\ residual\ mileage\ at\ the\ acquisition\ date}$$

DAMAGES FOR FRAUDULENT MISREPRESENTATION IN THE "DIESEL SCANDAL

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[1] BGH, judgment of 25.05.2020 - VI ZR 252/19, NJW 2020, 1962 margin numbers (Rn.) 78 - 82 with further evidence.

Buyers of VW cars affected by the diesel scandal have, according to the Federal Court of Justice (BGH), in principle a claim for rescission of the purchase contract[2] . Based on §§ 826, 823 paragraph II, 31, 249 BGB[3] and § 6 paragraph I 27 EG-FGV[4] announced the Senate as the guiding principles of the decision:

1. In terms of valuation, it is equivalent to direct fraudulent deception of the vehicle purchasers if a vehicle manufacturer, within the framework of a strategic decision made by it during the engine development, to obtain the type approvals of the vehicles by fraudulent deception of the *Kraftfahrt-Bundesamt* (German Federal Motor Transport Authority) and then to place the vehicles thus marked on the market, deliberately exploits the guilelessness and the trust of the vehicle purchasers.
2. If there are sufficient indications that at least one former member of the Board of Management was aware of the strategic decision taken, the defendant manufacturer bears the secondary burden of proof for the assertion that such knowledge did not exist. It is irrelevant whether the former members of the Board of Management could be named as witnesses by the plaintiff.
3. If someone is induced by conduct giving rise to liability to conclude a contract which he would not otherwise have concluded, he may suffer pecuniary loss even if the performance and consideration are objectively of value because the performance is not fully usable for his purposes. However, the affirmation of a pecuniary loss under this aspect presupposes that the performance obtained through the undesired contract is not only regarded as a loss from a purely subjectively arbitrary point of view, but also that the view of the market, taking into account the prevailing circumstances, regards the conclusion of the contract as unreasonable, not appropriate to the concrete pecuniary interests and thus as disadvantageous.
4. The principles of benefit sharing also apply to a claim arising from intentional immoral damage pursuant to Section 826 of the German Civil Code.

In the reasoning for the verdict at the time, the chairman of the senate found clear words for the manufacturer's behavior. The behavior of VW was "incompatible with the fundamental values of the legal and moral order," explained Stefan Seiters in justification of the decision: "immoral, and deliberately so," "attributable to the executive board of the car manufacturer.

By installing the defeat device, VW had "systematically and for many years" deceived the Federal Motor Transport Authority about compliance with the legally prescribed values. To produce more cheaply and increase profits is in itself a permissible goal, Seiters clarified. But on the one hand, this polluted the environment with more nitrogen oxides than permitted, and on the other hand, there was now a risk that all vehicles in the EA189 series could be taken out of service if the deception came to light. The Group had sold seven-digit numbers of such vehicles in Germany. VW had acted in a particularly reprehensible manner in relation to the buyers of these cars.

On the basis of a strategic corporate decision, approvals had been fraudulently obtained, deliberately taking advantage of the guilelessness and trust of the buyers, the Senate further justified its decision. "This judgment of unworthiness affects VW precisely with regard to the unknowing buyers."

NEW DECISION OF THE FEDERAL COURT OF JUSTICE

In the proceedings relating to lessees, the defendant's appeals, which were allowed by the courts of appeal, were initially successful. In proceedings VII ZR 285/21 and 783/21, they led in each case to the complete dismissal of the action and in proceedings VII ZR 247/21 to the reinstatement of the judgment of the Regional Court, which had only ordered the defendant to reimburse the purchase price paid by the plaintiff in June 2013 less the benefits derived after the purchase.

As the Federal Court of Justice ruled in its judgment, in the context of tortious benefit sharing, the value of the benefits of use of a motor vehicle obtained during the leasing period corresponds in amount to the contractually agreed leasing payments. Furthermore, the plaintiff is not entitled to reimbursement of the costs incurred for the sports chassis (threaded chassis). As the Court of Appeal correctly decided without being challenged in this respect, the plaintiff cannot claim damages for the vehicle purchase made in August 2016, as this was made after the diesel scandal became known and despite this. Consequently, there is also no justified reason to hand over the vehicle to the defendant. Against this background, the installation of the coil over suspension does not constitute a wholly or partially wasted expense that could possibly be compensated.

EXCURSUS: U.S. PRINCIPLE OF PUNITIVE DAMAGES

In contrast to the very fact-oriented German tort law, which balances the interests of both parties, even in the case of tortious liability for damages, as is the case here with the diesel scandal, damages proceedings in the USA often involve substantial sums, which are awarded to injured parties by the courts, often by juries. Manufacturers of products there bear a high liability risk, as national regulations have created a case law that is as diverse as it is confusing. In order to distinguish the U.S. legal situation with regard to product liability law in contrast to the German one, the following case from 1992 lends itself due to its fundamental importance. It is a case that has drawn wide circles and caused international head-shaking about U.S. jurisprudence on "punitive damages." It involved an elderly woman who had burned herself on

[2] BGH, judgment of 25.05.2020 - VI ZR 252/19.
[3] German Civil Code BGB
[4] EC Vehicle Approval Regulation — EG-FGV

a coffee cup in a McDonald's chain store and was awarded millions in compensation. "Liebeck . /. McDonald's."[5]

The injured party was in her grandson's vehicle, where she removed the plastic lid from the coffee from the fast food chain and spilled the entire coffee. As she held the cup between her knees, it flowed down her legs and, being absorbed by her sweatpants, came into contact with her skin over a prolonged period of time. She suffered third-degree burns to 6% of her body surface as a result and had to spend eight days in hospital, where she also required a skin graft. The injured party's health never really recovered from the consequences of the accident. In addition, the burned area was considered to be a particularly sensitive part of the body.

The injured party then demanded USD 20,000 compensation from McDonald's for the treatment and medical costs. However, they were only willing to settle for $800. In the ensuing lawsuit, it emerged that more than 700 claims related to overly hot coffee had been filed against McDonald's between 1982 and 1992. Despite these incidents, the chain did not lower the temperature of the coffee. The jury then awarded the injured party $2.7 million in punitive damages. It also awarded $160,000 in damages for pain and suffering.

The case vividly illustrates the fundamental differences between the U.S. and German legal situation in the area of damages. In addition to the awarded material damages and compensation for pain and suffering, punitive damages are also awarded, the purpose of which is to punish the defendant for his conduct, to prevent him from engaging in such unlawful conduct again (special prevention) and also to prevent others from ever doing so (general prevention). Against the background of the burns suffered and the health consequences for the injured party, it is incomprehensible why McDonald's had only offered 800 USD in the run-up to the trial. If it also turns out that this is not an isolated case, but that hundreds of victims exist without the company making any effort to lower its coffee temperature, a corresponding claim for punitive damages fulfills exactly its purpose: the damaging party is to be punished for its behavior. If one then takes into account the company profits that McDonald's achieves through the sale of coffee, the amount awarded is not even one. Nevertheless, German law on damages does not recognize such an approach. The recent leasing judgment, which stands in marked contrast to the judgment for buyers of diesel scandal vehicles, must also be viewed against this background.

GERMAN PRINCIPLE OF COMPENSATION FOR DAMAGES OF BENEFIT SHARING ON THE CONCRETE EXAMPLE AND IN THE DIFFERENCE PURCHASE TO LEASING WITH DIESEL SCANDAL VEHICLES

The institute of benefit sharing has been developed in the law of damages from the principle of good faith (§ 242 BGB). It states that the injured party is to be credited to a certain extent with those advantages that accrue to him in adequate connection with the event causing the damage, whereby a fair balance is to be brought about between the conflicting interests in a case of damage. In accordance with the prohibition of enrichment under the law on damages, the injured party may not be placed in a better position than he would have been in without the damaging event. On the other hand, only those advantages resulting from a damaging event are to be credited to the claim for damages whose crediting is consistent with the respective purpose of the claim for compensation - i.e. those that are reasonable for the injured party and do not unreasonably relieve the damaging party. Within the framework of an evaluative approach, the advantages and the disadvantages must be "combined, as it were, into one unit of account.[6]

The principles of benefit sharing also apply to a claim for damages due to intentional immoral damage pursuant to Section 826 of the German Civil Code.[7] Consequently, such a claim for damages is also to be "reduced by way of benefit offsetting by the benefits of use which accrued to the injured party in adequate connection with the damaging event". [8]

The basic principle is that in the case of a lease, there is no entitlement to reimbursement of the lease payments because the value of the benefits of use obtained during the lease period corresponds to the amount of the lease payments. [9]

Insofar as a later acquisition of vehicle ownership by the plaintiff has not already been agreed upon conclusion of the leasing agreement, the assumption that the injured party, by concluding the leasing agreement, has made an investment decision that is fundamentally different from the purchase, which justifies determining the usage benefit to be imputed differently than in the case of purchase,[10] is not objectionable in the opinion of the BGH.[11] The BGH[12] now adopts the controversial view, but one that prevails in the case law of the higher regional courts, according to which the value of the benefits of use of a motor vehicle obtained during the leasing period corresponds in terms of amount to the contractually agreed leasing payments. The court thus confirms the previ-

[5] Liebeck v. McDonald's Restaurants, P.T.S., Inc, No. D-202 CV-93-02419, 1995 WL 360309 (Bernalillo County, N.M. Dist. Ct. August 18, 1994).

[6] BGH, judgment of September 16, 2021 - VII ZR 192/20, WM 2021, 2056 marginal no. 38 with reference to BGH, judgment of May 25, 2020 - VI ZR 252/19, BGHZ 225, 316 marginal no. 65 = NJW 2020, 1961; BGH, judgment of August 6, 2019 - X ZR 165/18, NJW 2020, 42 marginal no. 8 f. (compensation payments under the Passenger Rights Regulation); BGH, judgment of 10.07.2008 -VII ZR 16/07, NJW 2008, 3359 marginal no. 20; BGH, judgment of 28.06.2007 -VII ZR 81/06, BGHZ 173, 83 = NJW 2007, 2695 marginal no. 18 (on the application of the principles of benefit sharing under the law on damages in the case of warranty claims in the contractual chain of performance).

[7] BGH, judgment of 16.09.2021 - VII ZR 192/20, WM 2021, 2056 marginal no. 38 with reference to BGH, judgment of 25.05.2020 - VI ZR 252/19, BGHZ 225, 316 marginal no. 66 = NJW 2020, 1961; BGH, judgment of 14.10.1971 -VII ZR 313/69, BGHZ 57, 137 = NJW 1972, 250, juris marginal no. 15.

[8] BGH, judgment of 16.9.2021 - VII ZR 192/20, WM 2021, 2056 marginal no. 38 with reference to BGH, judgment of 25.05.2020 - VI ZR 252/19, BGHZ 225, 316 marginal no. 64 et seq. = NJW 2020, 1961.

[9] BGH, judgment of 16.09.2021 - VII ZR 192/20, WM 2021, 2056 para. 40.

[10] Case law considers the investment decision to be significant for the assessment of the benefit of use: cf. for example BGH, judgment of 06.10.2005 - VII ZR 325/03, BGHZ 164, 235 = NJW 2006, 53, juris marginal no. 15 (cf. also BeckOGK BGB/*Mössner*, § 100 BGB marginal no. 11.4).

[11] BGH, judgment of 16.09.2021 - VII ZR 192/20, WM 2021, 2056 marginal no. 41.

[12] BGH, judgment of 16.09.2021 - VII ZR 192/20, WM 2021, 2056 para. 42.

ous case law of the OLG[13] Dresden,[14] OLG Düsseldorf,[15] OLG Frankfurt,[16] OLG Karlsruhe,[17] OLG München[18] and the OLG Stuttgart.[19]

Since, in the case of a car purchase, the purchaser has the opportunity to use the vehicle without time limit over its entire mileage until it becomes unfit for use, the purchase price payment and total use are "congruent" - according to the Federal Court of Justice[20] - and can therefore also be offset against each other. From an evaluative point of view, they are, as it were, combined to form a single unit of account.[21] Consequently, it is also appropriate to assess vehicle use by comparing the purchase price - as a suitable reference point for the objective vehicle value[22] - with the expected mileage at the time of purchase and multiplying the resulting value of use per kilometer of driving distance by the distance driven since purchase. [23]

In the case of leasing, on the other hand, the lessee only acquires the possibility of using the leased vehicle over a specific period of time under certain conditions agreed with the lessor. The special nature of the use of the vehicle compared with the purchase of a vehicle has a different value of its own, namely one that is fundamentally time-related.[24] This value can be offset against the lease payments. The agreed leasing price is a suitable point of reference for the valuation. This is in line with the principle that the objective value of a benefit of use to be surrendered is generally to be measured on the basis of the customary market price of a contractual grant of use. The only exception is if the surrender norm requires a different valuation, as is the case in particular with the reversal of a purchase agreement.[25] The consequence of this is that the lessee, who in the specific case was able to use the vehicle over the entire leasing period without any significant restrictions, has also fully realized the advantage to which the conclusion of the leasing agreement was directed.[26] This advantage then compensates for the entire financial disadvantage associated with the lease payments - which is ultimately comparable to the situation of a vehicle purchaser who has exhausted the vehicle's mileage expectancy.[27] Finally, the BGH[28] states, with reference to the prevailing opinion in the case law of the higher courts and voices in the literature, that the leasing price is also not to be reduced by the financing costs, the lessor's profit or other ancillary costs contained therein in the context of the offsetting of benefits, since corresponding costs are in the nature of the leasing contract and are included in the objective value of the leased vehicle use: In the case of a leasing contract - in contrast to a vehicle purchase - any financing costs do not increase the objective benefit of use.[29] In contrast, there are no differences between purchase and leasing agreements with regard to the treatment of the profit share, as the profit of the (commercial) seller is also included in the calculation of the benefit of use via the purchase price in the case of a purchase.[30]

CONCLUSION

Even in the case of a claim by an injured party against the tortfeasor (motor vehicle manufacturer) arising from intentional immoral damage within the meaning of Section 826 of the German Civil Code (BGB), the injured party must, via the principle of benefit sharing as an outgrowth of the principle[31] of good faith that governs all legal life in accordance with Section 242 of the German Civil Code (BGB), allow those benefits to be offset that accrued to him in connection with the damaging event and thereby reduce his claim for damages. The principle of benefit sharing thus applies to the entire law of damages. In its decision commented on here, the Federal Court of Justice applies this approach to benefits from the use of leased vehicles in connection with the diesel emissions scandal. For a long time, it was disputed whether

[13] The German judicial system has the Federal Court of Justice (BGH) as the highest court below the Constitutional Court (BVerfG or Federal Constitutional Court) and below that the instances from top to bottom with the Higher Regional Courts, Regional Courts and Local Courts.

[14] OLG Dresden, decision of 02.02.2021 - 17 U 1492/19, juris: If the lessee's agreed lease payment (lease installments and, if applicable, one-time payment) has corresponded to those on the market for an equivalent or largely comparable vehicle - or if the lessee has leased, if applicable, even at more favorable terms than those actually agreed - his loss has been fully absorbed if he was able to use the vehicle without interruption during the entire lease term.

[15] OLG Düsseldorf, judgment dated January 26, 2021 - 23 U 73/19, juris: If there was no restriction on the usability of the repaired vehicle over the entire term of the finance lease - and thus no impairment of the lessee's legal position - the lessee did not suffer any damage.

[16] OLG Frankfurt, decision of 15.02.2021 - 19 U 203/20, juris: In the case of a mileage leasing contract, there is no recoverable damage if the lessee was able to exercise the contractually owed right of use without restriction despite the vehicle being in a state of disrepair.

[17] OLG Karlsruhe, judgment of 21.01.2020 - 17 U 2/19, MDR 2020, MDR Year 2020 Page 672 = DAR 2020, DAR Year 2020 Page 455 - juris: Advantages of use to be offset in the case of a finance lease agreement for a motor vehicle are not calculated - unlike in the case of a purchase agreement - on the basis of the pro rata temporis linear reduction in value, i.e. on the basis of a comparison between the actual use and the expected total useful life of the item, taking into account the value of the item or the purchase price, but on the basis of the objective leasing value, i.e. the leasing charges customary for the vehicle used or for a comparable vehicle, due to the lease-like nature of the finance lease agreement, as in the case of a rented item.

[18] OLG Munich, decision of 14.12.2020 - 32 U 5915/20, juris.

[19] OLG Stuttgart, judgment of 09.04.2020 - 2 U 156/19, juris: If the risk of an operating restriction or shutdown has not materialized during the entire useful life.

[20] BGH, judgment of 16.09.2021 - VII ZR 192/20, WM 2021, 2056 marginal no. 43.

[21] BGH, judgment of 16.09.2021 - VII ZR 192/20, WM 2021, 2056 marginal no. 43.

[22] BGH, judgment of April 13, 2021 - VI ZR 274/20, ZIP 2021, 1220 para. 23.

[23] BGH, judgment of 16.09.2021 - VII ZR 192/20, WM 2021, 2056 marginal no. 43.

[24] BGH, judgment of 16.09.2021 - VII ZR 192/20, WM 2021, 2056 marginal no. 44.

[25] BGH, judgment of 16.09.2021 - VII ZR 192/20, WM 2021, 2056 marginal no. 44, with reference to BeckOK BGB/Fritzsche, § 100 marginal no. 10 and Staudinger/Stieper, § 100 BGB marginal no. 5.

[26] BGH, judgment of 16.09.2021 - VII ZR 192/20, WM 2021, 2056 marginal no. 45.

[27] BGH, judgment of 16.09.2021 - VII ZR 192/20, WM 2021, 2056 marginal no. 45, with reference to BGH, judgment of 30.07.2020 - VI ZR 354/19, BGHZ 226, 322 = NJW 2020, 1962 marginal no. 15.

[28] BGH, judgment of 16.09.2021 - VII ZR 192/20, WM 2021, 2056 marginal no. 48.

[29] BGH, judgment of September 16, 2021 - VII ZR 192/20, WM 2021, 2056 marginal no. 48, with reference to BGH, judgment of April 13, 2021 - VI ZR 274/20, ZIP 2021, 1220 marginal no. 23.

[30] BGH, judgment of 16.09.2021 - VII ZR 192/20, WM 2021, 2056 marginal no. 48.

[31] Palandt/Grüneberg, § 242 BGB Rn. 1.

lessees affected by the emissions scandal were also entitled to claims for damages against the vehicle manufacturer.

The starting point is to achieve a fair balance between the conflicting interests and the prohibition of enrichment under the law on damages. The injured party must not be placed in a better position than he would have been without the damaging event. Therefore, those advantages are to be credited to him "to a certain extent" which have accrued or accrue to him in adequate connection with the damaging event. However, advantages may only be credited if - from an evaluative point of view - advantages and disadvantages form a "unit of account".

The Federal Court of Justice thus fundamentally denied the lessee of leased vehicles affected by the diesel emissions scandal a claim for repayment of the leasing installments paid, because the lessee who only leases and does not purchase a vehicle ultimately acquires a mere possibility of use and thus - even if the vehicle is equipped with an impermissible defeat device - acquires only that, i.e. the use, for which he has also paid: the possibility of use as the subject matter of the leasing contract. In this basic constellation, no damage is incurred because the value of the use obtained by the lessee corresponds to the leasing installments paid by him - i.e., the use of a leased item has a time-related value.

However, the situation could be different in the event of an obligation on the part of the lessee to take over the vehicle (acquisition of vehicle ownership) already agreed upon at the time of conclusion of the contract. In such a constellation, in which the legal construct of leasing is designed as a form of vehicle financing, the focus of the transaction is no longer necessarily on the idea of use, but on the acquisition of the vehicle.

BIBLIOGRAPHY

BeckOGK BGB, Beck'scher Online Grosskommentar zum Zivilrecht, version as of Aug., 1st 2022 (cited: BeckOGK BGB-*editor*)/

BeckOK BGB, Beck'scher Online-Kommentar zum Bürgerlichen Gesetzbuch, 62nd ed. 2022 (cited: BeckOK BGB/*editor*)

BGH rulings as cited (partially with BGHZ cross references)

German law magazines (juris, MDR, NJW, WM, ZIP) as cited

OLG rulings as cited

Palandt, Otto: Bürgerliches Gesetzbuch, 81st ed. 2021 (cited: Palandt/*editor*)

Staudinger, Julius von: BGB, Buch 1, Allgemeiner Teil, §§ 90–124; 130–133, (Sachbegriff, Geschäftsfähigkeit, Willenserklärung, Anfechtung, Auslegung), ed. 2021 (cited: Staudinger/*editor*)

Received: April 13, 2023 Revised: April 17, 2023 Accepted: July 12, 2023