

VW Exec's Case Shows How To Take The 5th After A Plea

By Jody Godoy

Law360 (December 20, 2019, 1:34 PM EST) -- A recent ruling for a former Volkswagen executive broke down why and how the Fifth Amendment still applies after a guilty plea, a lesson that defense attorneys say is helpful as state, federal and foreign enforcement authorities sometimes go after the same facts.

Former Volkswagen AG executive Oliver Schmidt pled guilty in 2017 over his involvement in the German automaker's flouting of clean air standards and is serving a seven-year prison sentence. In a decision that became final in November, a Michigan federal judge rejected an attempt by German plaintiffs suing the carmaker to make Schmidt answer questions about his plea.

Wayne E. Gosnell Jr., a defense attorney at Clayman & Rosenberg LLP, said that civil demands often run up against defendants' right to be free from self-incrimination. He said the Schmidt ruling reiterates the basic questions that apply when judges consider an assertion of the Fifth Amendment.

"This is a very thoughtful opinion, and I think it lays out the standards very well in terms of what the various parties are required to show," Gosnell said.

In the late October ruling, U.S. Magistrate Judge Mona Majzoub considered four categories of questions, from those that seemed innocent to blatant perjury traps. One of the factors the judge considered was the possibility that Schmidt, still within U.S. prosecutors' reach while in prison, could be forced to incriminate himself in a hypothetical state case.

"The plea agreement between respondent and the United States is narrow and does not foreclose the possibility of further criminal charges at either the federal or the state levels," the judge wrote.

Despite double jeopardy law, overlapping state and federal prosecutions are not unheard of. Until the case was thrown out Wednesday, former Trump campaign chair Paul Manafort was facing mortgage fraud charges in Manhattan while he serves a federal sentence for bank fraud.

Daniel W. Levy, a principal in McKool Smith PC's New York office, said the Schmidt ruling serves as a "stark reminder" that Fifth Amendment protections cover even those who have already been convicted or entered a plea agreement and admitted to a detailed statement of facts.

The fact that Judge Majzoub found it reasonable for Schmidt to fear additional state or federal charges makes the ruling notable, Levy said.

"This is an important ruling of general application because, as a matter of practice, federal plea agreements almost never bind the entire Department of Justice, and most federal crimes will have state law analogues," Levy said.

In Schmidt's case, the judge also considered the danger of prosecutors going after Schmidt for any statements he might make in a deposition that were inconsistent with his previous testimony or with their view of the facts.

Judge Majzoub ruled that Schmidt didn't have to answer seemingly innocent questions about who prepared a presentation for VW management on the risks of U.S. regulators finding out about the automaker's defeat devices. Schmidt's defense attorneys argued that answers to such questions could be used as the basis for a false statement or perjury charge.

The judge took into account the "contentious" nature of the case, what Schmidt called his "fractious" relationship with prosecutors and the fact that the plea deal had been highly negotiated.

"Under these circumstances, respondent's fear of further crimination or prosecution for perjury or making false statements is not merely imaginative or speculative; it is real, and it is reasonable," the judge said.

Outside the white collar context, Gosnell said that Fifth Amendment concerns are likely to arise from civil cases brought by childhood victims of sexual abuse under the recently passed Child Victims Act. Even if a plaintiff seeks information about conduct that is too old to charge under state law, such testimony could still potentially be used as evidence at a criminal trial, he said.

The case is *In re: Baumer et al.*, case number 2:17-mc-50228, in the U.S. District Court for the Eastern District of Michigan.

--Editing by Brian Baresch and Kelly Duncan.