Abstract
My major scholarly interests lie at the intersection of party autonomy, fairness and the protection of the weaker party. In my research I have returned numerous times to these questions and have attempted to look at them from different angles.

In my current project I will use the Volkswagen case as a natural comparative experiment: In the Volkswagen case (also known as Dieselgate) Volkswagen made false statements with regard to the emission levels of their diesel cars. The scandal was uncovered by the Environmental Protection Agency in September 2015 in the US, but the negative consequences have been the same for about eleven million consumers all over the world.

Despite the fact that the circumstances were almost the same in the US and the EU, they seem to lead to a different outcome for consumers. In my project I will analyze the reasons for the different results in the US and the EU and hope to present a solution which would lead to a more satisfying outcome in such cases in the future. The paper will also prove that the often heard claim that European consumers are better protected by the law than consumers in the US is not true.

The attached paper is an extremely preliminary draft as I am only starting out with this project. I welcome any and all feedback, suggestions, comments and criticisms on how to proceed. In particular, I would welcome views on how to narrow the scope of the paper down as the Volkswagen case involves questions of tort law, procedural law, international private law, criminal law, administrative law and constitutional law – but my time at NYU is limited.

I. Introduction
On September 18, 2015, the US Environmental Protection Agency (EPA) issued a Notice of Violation to Volkswagen and Audi, the latter being a Volkswagen subsidiary, alleging that several types of cars manufactured and sold by these companies in the US included software

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1 Notably, emission standards differ to a certain extent between Europe and the United States, see below III. 2.
that circumvents EPA emission standards for nitrogen oxides. On the same day, the California Air Resources Board (CARB) informed Volkswagen that it had also started enforcement investigations because of the alleged software use. Since then, the Volkswagen emission scandal has generated much public attention all over the world. Shortly after the manipulations became public, discussions regarding the legal consequences of Volkswagen’s behaviour started in various jurisdictions. Naturally, as Volkswagen is a German company and roughly 2.4 million cars are affected by the manipulation in Germany alone, the question of what remedies consumers may have under German law and how these remedies may be enforced is one at the centre of the debate in Europe. Equally, as the scandal was uncovered in the United States and US public authorities seem to have taken the lead in the prosecution of Volkswagen, the legal situation in the US has also received much attention. Against this backdrop, a comparison between the US approach in dealing with the scandal and the approach in Europe – and in Germany in particular – is especially interesting, as the public perception seems to be: “[I]n the US, VW owners get cash. In Europe, they get plastic tubes.”

The VW emission case raises a multitude of legal questions – relating to criminal law, civil law, procedural law, administrative law, international private law and shareholder suits. In this brief text, I will only provide an overview of the current proceedings in Germany and the US and then identify some questions that seem to be worth exploring comparatively.

II. Overview – What has happened in Europe – and particularly in Germany - so far?

After the manipulations regarding Volkswagen cars became public in September 2015, the German Federal Motor Transport Authority (Kraftfahrt-Bundesamt, KBA) ordered Volkswagen in early October 2015 to recall all cars affected by the software manipulation and

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2 According to the press release models affected by the manipulation include, inter alia, the VW Jetta, VW Golf, VW Passat and Audi A3, all with a 2.0 liter diesel engine. In a second notice on November 2, 2015, the EPA alleged that the software was also used in the 3.0 liter diesel engines of the VW Touareg, Porsche Cayenne, Audi A6 and A7 Quattro, Audi A8, Audi A8L and Audi Q5.
3 See: https://www.arb.ca.gov/newsrel/in_use_compliance_letter.pdf. For an overview of the regulatory system governing emission standards in the US see below III. 2.
4 Audi, Seat, Skoda and Porsche also belong to the Volkswagen group, and several models of these brands are also affected by the scandal, see also Fn. 2.
5 The Volkswagen Group sells its cars in 153 countries, see: http://www.volkswagenag.com/content/vwcorp/content/de/the_group/production_plants.html.
6 Worldwide roughly 11 million cars appear to be affected by the manipulations, see http://www.nytimes.com/interactive/2015/business/international/vw-diesel-emissions-scandal-explained.html.
to fix the cars in order to achieve compliance with the standards set down by EU regulations. In November 2015 the KBA also announced that it would re-examine the nitrogen oxide emissions of over 50 other types of diesel cars in order to determine whether further manipulations took place. Around the same time the KBA also approved the first repair plan regarding certain affected VW models. However, regarding several other affected cars it took significantly longer to approve the repair plans, and some repair plans also required subsequent adjustment because of unintended side effects. Today, it is estimated that there is still no approved repair plan for approximately 40% of the affected cars. Additionally, to date Volkswagen has only actually fixed about 500,000 cars across Europe. Thus, it is highly likely that it will take until 2017 to completely fix the remaining affected cars.

In addition to the actions taken by the KBA, the public prosecutor’s office in Brunswick, Germany, has stated in a press release that it has started criminal investigations against Volkswagen. However, it should be noted that under German criminal law it is not possible to hold companies directly accountable and only individuals can be charged with a crime. Accordingly, only crimes by individual Volkswagen employees are being investigated by the public prosecutor’s office, in particular (i) the fraudulent deception of customers as to the cars’ actual nitrogen oxides emissions (Sec. 263 StGB, Strafgesetzbuch, German Criminal Code) and (ii) market manipulation occasioned by having knowingly delayed public disclosure of the emission scandal’s financial consequences (Sec. 38 para. 1 No. 1 WpHG, Wertpapierhandelsgesetz, Securities Trading Act). Whether this investigation will actually lead to prosecutions and convictions depends on the ability of the state prosecution office to prove that a single individual has actually fulfilled all the statutory elements of one of the crimes mentioned. It remains unclear at the current stage whether this is likely to happen. Also, the

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8 See the press release of the KBA from October 16, 2015, available in German at: http://www.kba.de/DE/Home/infotext_startseite_VW_komplett.html.
10 The repair plan with regard to one affected model includes the installation of the “plastic tubes” mentioned in the quote above.
12 Sec. 4, 25 StGB. See also Kühl, ‘§ 14’ rec. 1a in: Lackner/Kühl, StGB, 28th edn, Munich 2014.
posibility of Volkswagen being fined as a company under Sec. 30 or Sec. 130 OWiG (Ordnungswidrigkeitengesetz, Act on Regulatory Offences\textsuperscript{15}) exists only if it can be established that individual employees of Volkswagen actually committed a crime or at least a regulatory offence which also violated a duty owed by Volkswagen.

On a European level the European Commission took action, too. Firstly, the Commission introduced a new emissions test procedure – one involving real driving – in several steps via different Commission regulations.\textsuperscript{16} The aim of the new test procedure coming into force in 2017 is to “reduce the current discrepancy between emissions measured in real driving to those measured in a laboratory”.\textsuperscript{17} However, until 2020 real driving emissions are allowed to be higher than emissions measured by laboratory testing by a factor of 2.1.\textsuperscript{18} In addition to the new test procedure, as a further ex ante measure to prevent future infringements of emission standards, the Commission published a proposal for a new regulation on the approval and market surveillance of motor vehicles.\textsuperscript{19} Core features of this proposed regulation include the introduction of a control system for conformity of cars already in use, greater EU oversight over the testing agencies performing the tests necessary to show to compliance with the emission standards, and greater financial independence of these agencies, which are currently paid by the manufacturers.\textsuperscript{20} However, whether the proposal will be adopted remains to be seen as the European Parliament and the Council are reportedly not willing to support such far-reaching changes to the current state of the law.\textsuperscript{21} Finally, the Commission allegedly plans to start formal infringement procedures against Germany and other European countries for failing to establish sufficient penalties for manufacturers who have infringed the Euro 5 and 6 emission standards as required by Art. 13 Regulation (EC) No 715/2007.\textsuperscript{22} However, so far no official statement has been issued in this regard.\textsuperscript{23}

\textsuperscript{17} See the press release at: http://ec.europa.eu/environment/air/transport/road.htm.
\textsuperscript{18} See in German: http://www.spiegel.de/auto/aktuell/volkswagen-affaire-eu-beschliesst-strengere-abgastests-a-1060047.html.
\textsuperscript{19} Com (2016) 31 Final.
\textsuperscript{21} See in German: http://www.spiegel.de/auto/aktuell/vw-skandal-eu-kommission-plant-vertragsverletzungsverfahren-a-1115546.html.
\textsuperscript{22} See in German: http://www.spiegel.de/auto/aktuell/vw-skandal-eu-kommission-plant-vertragsverletzungsverfahren-a-1115546.html.
\textsuperscript{23} ibid.
1. Remedies for consumers in Germany

Aside from the actions taken by public authorities and legislative bodies, some buyers of affected Volkswagen cars have taken individual action and have gone to court. However, so far only 14 cases have been decided. When thinking about consumer remedies, it seems natural to think first along the traditional lines of contract, tort and unjust enrichment. When doing so, however, it is important under German law to distinguish between remedies pursued against the seller of the manipulated car (as the contractual partner of the consumer) and remedies pursued directly against Volkswagen (as producer) since the majority of consumers did not buy their cars directly from Volkswagen or one of its subsidiaries.

a) Contractual remedies

Contractual remedies against the seller of a manipulated car depend first on whether the manipulation constitutes a lack of conformity within the meaning of Sec. 434 BGB (Bürgerliches Gesetzbuch, German Civil Code). There seems to be agreement between both courts and legal scholars that the manipulation constitutes a lack of conformity within the meaning of Sec. 434 para. 1 cl. 2 No. 2 BGB, as the cars sold were not in accordance with mandatory legal requirements. Depending on the circumstances, the manipulation may also constitute a lack of conformity within the meaning of Sec. 434 para. 1 cl. 1 BGB as Volkswagen had explicitly stated the emission standards in its advertising and, in turn, public statements by the producer can be attributed to the seller pursuant to Sec. 434 para. 1 cl. 3 BGB. The statement will not be attributed to seller only if (i) the seller did not know or did not have knowledge of the statement, (ii) the statement was corrected at the time of the conclusion of the contract, or (iii) the statement did not influence the buyer’s decision.

In cases of non-conformity, Sec. 437 BGB enumerates the remedies of the buyer:

First, the buyer can demand that the goods be brought into conformity either by repair or replacement (Sec. 439 BGB). It is only where repair or replacement is not possible or where the seller fails to repair or replace the good within a reasonable time that the consumers can ask for a price reduction or, where the non-conformity is not merely minor, for a rescission of the contract. Since the majority of the VW cars have not yet been repaired and since it is still uncertain whether the repairs proposed by Volkswagen will cause unintended side effects, it is

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25 Replacement is not a possible option in these cases as all identical cars were affected by the manipulation.
not surprising that the majority of claimants have sued for a rescission of the contract and sought return of the money paid (Secs. 323, 346 BGB) instead of demanding repair. Whether or not rescission of the contract is possible has, perhaps quite astonishingly from a German perspective, produced disagreement among several regional courts:

While some decisions have been rather consumer friendly, allowing the buyer to rescind the contract and recoup the sales price minus the value of the use of the car until rescission, other courts have rejected the rescission of the contract because either the seller did not specify a sufficient additional period for the goods to be brought into conformity (Sec. 323 para. 1 BGB) or because the lack of conformity was qualified as minor (Sec. 323 para. 5 cl. 2 BGB). It was argued by these courts that the buyer could be expected to wait and try Volkswagen’s repair plan first, that the car is usable without any restrictions, and that repairing the car would allegedly cost only 1% of the purchase price. Considering the fact that Volkswagen still has not repaired the majority of cars and considering that the repair of the defect is mandatorily required by the KBA, this reasoning appears questionable to say the least. In any event, it would be desirable for the different courts to find common ground and end the current state of legal uncertainty.

Aside from the rescission of the contract, scholars have also discussed other remedies such as damages (Sec. 280 seq. BGB) or reduction of price (Sec. 441 BGB). However, a claim for damages usually fails because the independent seller, who did not know about Volkswagen’s manipulations, can rebut the presumption of responsibility in Sec. 280 para. 1 cl. 2 BGB. With regard to the reduction of price, there might be difficulties in determining the reduced market value of the manipulated car.

Contractual remedies against Volkswagen, as the manufacturer of the manipulated car, are usually relevant only if the buyer has entered into a separate guarantee agreement with Volkswagen. However, such guarantees usually only cover the repair of any defects, and claims based on guarantees usually become time-barred rather quickly. Thus they do not provide

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26 The value of the use of the car is calculated by multiplying the gross purchase price by the distance the car has been driven by the buyer. This result is then divided by the estimated total distance the car can be expected to be driven, or if it was a used car by the estimated remaining distance the car can be driven.

27 Admittedly, this was not foreseeable at the time of the relevant judgments as Volkswagen had initially promised to fix all cars by the end of 2016.

28 The contractual remedies against the seller discussed above (Sec. 437 BGB) are also subject to limitation (Sec. 438 BGB). Claims usually become time-barred two years after goods are delivered
much relief for consumers in the VW case. The manufacturer’s direct liability to the consumer for the goods under the law of warranty would certainly be advantageous, but currently neither German nor European law provide for such a remedy.

b) Restitution of unjust enrichment (following a buyer’s mistake or deception by the seller)

If a contract was concluded while one party was mistaken about essential characteristics of the goods sold, or if a party was intentionally deceived or placed under duress, that party can void the contract (Sec. 119 para. 2 and Sec. 123 para 1 BGB). After the contract has been rescinded (Sec. 142 BGB), the buyer has a claim based on unjust enrichment against the seller for return of the money paid (Sec. 812 para. 1 cl. 1 alt. 1 BGB). In the present case, however, the seller will usually not succeed with such a claim. First, Sec. 119 para. 2 BGB is not applicable in the context of breach of warranty according to German legal scholarship and jurisprudence because it would undermine the seller’s right to initially attempt to bring the goods into conformity. Second, as mentioned above, the seller usually will not have had any knowledge of the manipulations and consequently could not deceive the buyer. Only in exceptional circumstances where the seller was a subsidiary, or at least presented itself as a subsidiary of Volkswagen, could Volkswagen’s knowledge of the manipulation be attributed to the seller. This in fact happened in a case heard by a regional court in Munich.

c) Tort remedies

Tort remedies are particularly interesting with regard to direct claims against Volkswagen. While it appears that so far no court decision has been published where Volkswagen was found liable under tort law, legal scholars discuss in particular claims under Sec. 823 para. 2 BGB (read in conjunction with Sec. 263 StGB), under Sec. 826 BGB, and under Sec. 831 BGB. In this regard it is important to distinguish further between claims against Volkswagen as a company and claims against individual Volkswagen employees. The liability of Volkswagen

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30 Sec. 1 ProdHaftG (Produkthaftungsgesetz, Act on Liability for Defective Products, Federal Law Gazette (BGBl.) 1989 I, p. 2198, recently amended by Art. 180 Act of 31.08.2015, Federal Law Gazette I 2015, p. 1474.) only applies if damage was caused to an item of property other than the defective product or if a person was harmed. Hence, product liability similarly fails to provide a legal ground for claims against Volkswagen in Germany.

31 LG Munich of April 14, 2016 – 23 O 23033/15 – available in German at juris.de.
employees who knew about the manipulations and deceived customers – and thus at least condoned the customer suffering damages – is theoretically possible under Sec. 823 para. 2 BGB (read in conjunction with Sec. 263 StGB)\textsuperscript{32} or under Sec. 826 BGB. If such liability were established on the facts, liability of the Volkswagen AG as company could also be based on Sec. 31 BGB (if the wrongdoer is a leading manager or director) or on Sec. 831 BGB (if the wrongdoer is a subordinate employee) as a company is with certain exceptions generally liable for the wrongdoing of its directors/employees. However, it is questionable whether in practice the claimant can actually prove that all requirements for liability are satisfied by one particular employee. In any event, compensation would comprise only reliance damages.

Liability of the Volkswagen AG under sec. 826 BGB is, furthermore, possible even when the wrongdoing of one person under Sec. 823 para. 2 BGB (read in conjunction with Sec. 263 StGB) or under Sec. 826 BGB cannot be established. This is done by treating the company as a single (fictional) person and by attributing all company-related knowledge of employees to the company (“Wissenszurechnung“), thus piecing together all the different elements for liability under Sec. 826 BGB that are present in different individuals. This is probably easier than proving one single person’s wrongdoing altogether, and consequently this approach seems more promising. Yet it is not without obstacles either as claimants still need to prove that the reliance damages they suffered individually were at least condoned by Volkswagen.

\textbf{d) Remedies under the Unfair Competition Act (Gesetz gegen den unlauteren Wettbewerb, UWG)}\textsuperscript{33}

Volkswagen stated publicly on their website and in sales brochures that their cars were in accordance with Euro 5 regulations and that their cars would not exceed certain nitrogen oxides emission figures, while in fact the cars’ seeming compliance with these regulations and figures was achieved only because the manipulative software would sense when the car was tested for compliance and modify the engine accordingly. This type of behaviour constitutes a misleading commercial practice within the meaning of Sec. 5 para. 1 No. 1 UWG. In addition, a misleading commercial practice could also be established if cars were advertised as “eco-friendly” or the like when in fact they were not even in accordance with mandatory emission requirements. Remedies against such a misleading commercial practice include injunction and claims for

\textsuperscript{32} With regard to Sec. 263 StGB, see also above II.

remedial action (Sec. 8 UWG), but they also include claims for damages (Sec. 9 UWG) and the confiscation of ill-gotten gains (Sec. 10 UWG). However, it appears that violations of UWG provisions by Volkswagen have similarly not yet been brought forward in court – which is not especially surprising given the fact that consumers have no standing under German unfair competition law and consumer organizations can only sue for injunctions and the confiscation of ill-gotten gains. The latter, however, requires the proof of intent and the consumer organization has to bear the risk of losing the court proceedings while, in the case of winning, being forced to donate any skinned-off profit to the federal budget. Given these restrictions of Sec. 10 UWG it is little wonder that since the introduction of this provision in 2004 only 10 claims have been based on it.

2. Enforcement of Consumer Remedies in Germany

With regard to the enforcement of the above-mentioned remedies, the individual consumers are usually on their own. Unlike in the US, there is no class action procedure under German law. Equally, attorneys are generally not allowed to work on a contingency fee basis. Because of this, a consumer usually bears the risk of having to pay the entire costs of both the proceedings and attorney fees in the event his or her claim fails. It is only where the individual claimant has legal expense insurance or has no resources to bear the costs of the proceeding, thus qualifying the claimant for legal aid (“Prozesskostenhilfe”), that this risk will be mitigated. Each of these avenues, however, is the exception and not the general rule; consequently, asserting their rights is often not very attractive for consumers. While in the past the Federal Ministry of Justice and Consumer Protection considered introducing some sort of class action procedure into German law for the benefit of better consumer protection, this plan was allegedly abandoned after the VW emission scandal became public. Consumer organizations, which have been advocating the introduction of a class action procedure for many years, can thus only help consumers by bringing claims under Sec. 8 and Sec. 10 UWG – as well as by seeking an

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34 These claims can brought by competitors, certain trade associations, certain consumer organizations (so-called qualified entities) and the Chamber of Industry and Commerce or the Craft Chambers.
35 Only competitors can bring a claim for damages.
36 Except for competitors, the same claimants as mentioned in Fn. 34 can bring this claim.
37 This being the case only in the context of investor claims based on certain capital market laws. The KapMuG (Kapitalanleger-Musterverfahrensgesetz, Act on Model Case Proceedings in Disputes under Capital Markets Law, Federal Law Gazette (BGBl.) I 2012, p. 2182, most recently amended by Art. 16 Act of 30.06.2016, Federal Law Gazette (BGBl.) I, p. 1514) allows for a model case proceeding. Volkswagen is facing such a proceeding because of the emission scandal, too. See LG Brunswick of Mai 19, 2016 – 5 O 2075/15.
38 Considering the disagreement between several regional courts regarding the issue of rescission, the risk of losing the case is particularly present, see above 1. a).
39 See the speech of state secretary Billen available in German at https://www.bmjv.de/SharedDocs/Reden/DE/2015/09282015_StBillen_vzbv.html.
40 By contrast, only competitors can bring a claim for damages (Sec. 9 UWG).
injunction in connection with the violation of some consumer laws under the UKlaG (Unterlassungsklagengesetz, Injunctions Act)\(^\text{41}\) – all of which do not allow for damages.

3. Summary of the current situation in Germany

This short overview about the legal ramifications of the VW emission scandal in Germany clearly shows that while consumers might get slightly more than just a “plastic tube”, the actual enforcement of rights for consumers is certainly limited. Considering the financial compensation consumers will receive under the California court settlement in the US (see below), one cannot help but wonder how such a disparate treatment can be justified. At least in the opinion of the European Consumer Organisation BEUC, “it is inconceivable that consumers in the EU get treated differently”, and consequently BEUC urges national authorities to become more active.\(^\text{42}\) One implicit policy reason for the reluctance of the German authorities and some German courts to go after Volkswagen might be that the company, as the second biggest German company in the world after Allianz Insurance SE (according to Forbes Magazine\(^\text{43}\)), is seen as “too big to fail” or as some sort of “sacred cow” because of its immense importance for the national economy. At a minimum it appears that in other European countries, such as Austria, Volkswagen is being pursued somewhat more vigorously both by way of private and criminal law despite the underlying legal rules being similar to those of Germany.\(^\text{44}\)

III. The Situation in the US

1. Overview: What has happened so far in the US

Compared to the situation in Germany, consumers in the US have a much brighter outlook. After the scandal became public in September 2015, numerous consumer lawsuits were filed in various federal courts all over the country. Following a decision by the Judicial Panel on


\(^{43}\) See: http://www.forbes.com/global2000/list/#tab:overall. According to this ranking the Volkswagen Group is also the 22nd biggest company in the world.

\(^{44}\) See the overview of the measures taken in Austria, available in German at: https://verbraucherrecht.at/cms/index.php?id=2419. Notable are in particular two recent Austrian court decisions. The judgment of LG Linz of June 13, 2016 – 45 Cg 35/15 h-20 – is interesting because the court found that a buyer, who erred about the existence of the software manipulation, can rescind the contract on the grounds of mistake and claim back the money paid minus the value of the use of the car until rescission. The judgment of the BG Amstetten of August 30, 2016 – 40 C 905/16v – 25 – is equally interesting because the court found that the seller of a manipulated Volkswagen car is liable to compensate all future damages the buyer might suffer as a consequence of the fact that she bought a car affected by the software manipulation. The seller was found liable despite the fact that the company had no knowledge of the manipulations because Volkswagen’s knowledge of the manipulation was attributed to the seller. A direct claim against Volkswagen, however, was found to be inadmissible because the Austrian court did not have jurisdiction under the Brussels Regulation.
Multidistrict Litigation, these lawsuits were bundled into a single class action in front of the Federal District Court for the Northern District of California.\textsuperscript{45} Subsequently, the FTC and the Department of Justice (DOJ), on behalf of the EPA, also joined this action.\textsuperscript{46} As far as private claimants are concerned, this joint action is, inter alia, based on state fraud, breach of contract and unjust enrichment laws as well as state consumer protection laws. The DOJ based its claim on Sec. 204 (injunctive relief) and Sec. 205 (civil penalties) of the Clean Air Act (CAA), whereas the FTC has brought a claim pursuant to Sec 13 (b) of the Federal Trade Commission Act (FTCA) (injunctive relief) because of Volkswagen’s deceptive advertising. As it stands, the proceedings were just recently settled as the court gave final approval to the settlement plan submitted by the parties involved (the California settlement)\textsuperscript{47} on October 25, 2016, after the final approval hearing took place on October 18, 2016.\textsuperscript{48} Under the settlement Volkswagen has agreed not only to either buy back affected 2.0-liter diesel cars or modify the engines to reduce emissions, but also to pay each buyer an additional sum of money.\textsuperscript{49} However, it should be noted that until now CARB/the EPA have rejected all proposed recall plans for 2.0-liter diesel cars.\textsuperscript{50} One reason why it is more difficult for Volkswagen to present an engine modification that brings the affected cars in accordance with US regulations than to present a modification that satisfies German and European public authorities may be that with regard to the emission of nitrogen oxides, US standards are much stricter than European standards.\textsuperscript{51} In addition to the consumer remedies just described, the settlement stipulates further that Volkswagen will pay $2.7 billion into a trust to support environmental programs trying to reduce nitrogen oxides in the atmosphere and invest $2 billion into “zero-emission vehicles”.\textsuperscript{52} Not covered by this settlement are the manipulated cars having a 3.0-liter diesel engine, for which CARB only just recently also rejected Volkswagen’s and Porsche’s proposed recall plan.\textsuperscript{53} In this regard litigation continues. Equally, the settlement does not cover possible criminal and civil penalties

\textsuperscript{45} See the transfer order available at: http://www.cand.uscourts.gov/crb/vwmdl.
\textsuperscript{46} The EPA brought its claim initially before the U.S. District Court for the Eastern District of Michigan, but the proceedings were transferred to the Federal District Court for the Northern District of California, see Congressional Research Service, Volkswagen, Defeat Devices, and the Clean Air Act: Frequently Asked Questions, September 2016, p. 10 available at: https://www.fas.org/sgp/crs/misc/R44372.pdf.
\textsuperscript{47} CARB and the Attorney General of California also joined the settlement as a reflection of “CARB’s unique status under the Clean Air Act” see: http://www.cand.uscourts.gov/filelibrary/2848/California-Notice-re-Joinder.pdf. For an overview of the regulatory system governing emission standards in the US see below III. 2
\textsuperscript{48} See: https://www.vwcourtsettlement.com/en/.
\textsuperscript{49} The exact amount payable depends on the type of car and on which of the two options the buyer chooses. For an overview see: http://www.cand.uscourts.gov/crb/vwmdl/proposed-settlement#Summary.
\textsuperscript{50} See: https://arcb.ca.gov/msprog/vw_info/rejection_vw.pdf.
\textsuperscript{52} See: http://www.cand.uscourts.gov/crb/vwmdl/proposed-settlement#Summary.
\textsuperscript{53} See: https://www.arb.ca.gov/newsrel/newsrelease.php?id=840.
under federal law\textsuperscript{54} nor possible state penalties.\textsuperscript{55} Thus, in addition to the billions of dollars to be paid under the California court settlement, Volkswagen may have to pay even more money to settle the other proceedings still pending.\textsuperscript{56} For certain Volkswagen has to pay at least another $1.2 billion under a settlement reached with its US car dealers.\textsuperscript{57} With regard to possible criminal penalties, it should be noted that as part of a recent plea agreement a first Volkswagen employee – an engineer – has admitted to having helped evade emission standards and has agreed to cooperate with government investigators.\textsuperscript{58}

2. The development of US emission standards in contrast to the development in Europe

Historically, the problem of air pollution by automobiles (in particular automobiles as a source of ground-level ozone) first received public attention following independent research in the mid-1950s.\textsuperscript{59} As a result, around the same time federal and state governments started their first attempts to deal with the problem. Throughout that early period of government regulation, California took the leading role in controlling vehicle pollution.\textsuperscript{60} In the 1960s the federal government followed suit and engaged in the actual regulation of vehicle emissions for the first time by adopting California standards.\textsuperscript{61} Today, under the Clean Air Act the Environmental Protection Agency (EPA) establishes federal emission standards for vehicles following the federal rule-making process.\textsuperscript{62} The standards cover, inter alia, the emission of nitrogen oxides, carbon oxides and non-methane organic gases.\textsuperscript{63} California, due to its initial leading role, is the only state which is still allowed to administer its own emissions standards (via CARB) pursuant to sec. 209 CAA.\textsuperscript{64} If violations of the federal/California standards occur, the EPA and CARB can bring claims for both injunctive relief and civil penalties.

\textsuperscript{55} See below 4.
\textsuperscript{56} See below 4.
\textsuperscript{61} Ibid.
\textsuperscript{62} Ibid, p. 13.
\textsuperscript{63} Ibid, p. 2.
\textsuperscript{64} Ibid, p. 12.
When comparing the current standards to the European ones, it is initially apparent that the US standards are much stricter with regard to the emission of nitrogen oxides, whereas the EU has much stricter regulations with regard to carbon monoxide and carbon dioxide.\textsuperscript{65} One reason for this could be that that regulators in the US were more concerned with the negative effect of nitrogen oxides for human health as well as for the environment (smog and acid rain), whereas regulators in Europe were more concerned about the detrimental effect of carbon oxides contributing to global warming.\textsuperscript{66} Interestingly though, it is relatively easy (cheap) to bring diesel engines into compliance with the high standards regarding carbon oxides typical for Europe, while it is rather expensive to modify diesel engines so they are in compliance with the high standards regarding nitrogen oxides typical for the US.\textsuperscript{67} One recent empirical study suggests that this is one of the reasons why diesel is much more popular in Europe than in the US.\textsuperscript{68} If Europe had introduced nitrogen oxide standards similar to the US standards, European car manufacturers, especially Volkswagen, would have had significant retrofitting costs, which would have made their vehicles more expensive and less appealing to consumers.\textsuperscript{69} Instead, the existing lower standards had a significant trade effect favouring European car manufacturers and their advanced diesel technology.\textsuperscript{70} Whether this effect was intended or just a result of environmental policy, however, remains unclear.

3. Consumer claims

Just as under German law, the first topics that come to mind when thinking about consumer claims resulting from the emission scandal are (fraudulent) misrepresentation, mistake and breach of warranty. While examining these topics, it is important to remember that in the US the states are the primary source for private law in general and the law of contracts in particular. This creates a quite complicated mosaic and a full account of the legal situation in this regard can only be part of the final paper. At this point it must suffice to highlight some of the different remedies in play in the California proceedings. Those were in particular: damages, rescission of the sales and lease contracts of affected cars, and repair.

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\textsuperscript{67} Ibid, p. 14. It appears that with regard to gasoline it is the other way around.

\textsuperscript{68} Ibid, p. 13 et seqq.

\textsuperscript{69} Ibid, p. 29 et seqq.

\textsuperscript{70} Ibid, p. 32 et seqq.
\end{flushleft}
4. Claims of government agencies

The use of manipulating software to cover up high nitrogen oxide emissions may violate numerous federal and state laws and has led various public authorities to bring forward claims against Volkswagen. As with the inquiry into all the different state contract laws, an in-depth analysis of all possible violations and proceedings will, due to present time constraints, only be part of the final version of the paper due. Consequently, this section will just give a short overview about some of the claims, in particular those claims which received the most media attention as being particularly tough on Volkswagen in terms of potential monetary relief.

First of all, the already mentioned California settlement between Volkswagen and the Department of Justice on behalf of the Environmental Protection Agency (EPA) partially covers the EPA’s claims for injunctive relief pursuant to CAA Sec. 204 so as to enjoin the alleged violations of CAA Sec. 203 (a) (1), (2), (3) (A) and (B). As described above, the settlement allows the owner of affected 2.0-liter diesel cars to either choose to sell back their car to Volkswagen or to have them repaired. In any event, owners will receive an additional substantial cash payment. Further, Volkswagen will have to invest $4.7 billion to mitigate the damages done to the environment (for details see above III. 1). The question of further injunctive relief with regard to 3.0-liter diesel cars is still outstanding.

As the settlement excludes any form of civil penalties under the CAA, it remains open to question what will happen to these claims before the California court.71 If the court delivers a judgment in favour of the EPA, the penalties could add up to $18 billion as CAA Sec. 205 (a) allows, inter alia, for a penalty up to $32,500 for each violation of CAA Sec. 203 (a) (1) and (3) (A) occurring prior to January 13, 2009, and $37,500 for each manipulation occurring after that date (each of the roughly 500,000 manipulated cars in the US constitutes a violation).72

Aside from the EPA, a second federal agency, the Federal Trade Commission (FTC), has also brought claims against Volkswagen and joined the California proceedings alleging that Volkswagen deceived customers with its “clean diesel” campaign. As part of the recently approved California settlement, the FTC has withdrawn its complaint in exchange for a permanent injunction and other equitable relief (FTCA Sec. 13 (b)) regarding violations of FTCA Sec. 5 (a) that stem from the deceptive advertising of 2.0-liter diesel cars. The FTC’s

72 The adjusted amount of the penalties follows from 40 CFR Ch. I (7-11-11 Edition) sec. 19.4.
partial consent order covers not only the consumer relief described above (buy-back/repair affected cars plus cash payment) but also provides that Volkswagen will refrain from advertising/selling any manipulated cars and from misrepresenting that the manipulated cars are eco-friendly or have low emissions. The complaint regarding the deceptive advertising of 3.0-liter diesel cars is still not resolved.

As mentioned above, the California Air Resources Board (CARB), having a special role in the enforcement of vehicle emissions standards, and the Attorney General of California have taken a leading role in prosecuting Volkswagen. Accordingly, both took part in the California settlement; as a result California will receive $380 million of the trust funds to pay for environmental protections, and $800 million dollar will be invested in California to research and develop “zero emissions vehicles” so as to mitigate the environmental harm done by Volkswagen.73 Furthermore, in a separate settlement the Attorney General of California resolved claims for civil penalties and further injunctive relief under Secs. 17206, 17535 and 17536 of the California Business and Professions Code for violations of Secs. 17200, 17500 and 17580.5 of that Code (in particular false advertising) and under Sec. 1055 of the Consumer Financial Protection Act of 2010 for violations of Sec. 1036 a (1) (B) of that Act. As a result California will, inter alia, receive an additional sum of $86 million.74 Other possible claims, however, have not yet been settled. In particular, certain claims for civil penalties by CARB under the California Health and Safety Code may cost Volkswagen an additional sum of up to $5,000 for any affected vehicle in California.75

Finally, three further state actions deserve closer attention. In an orchestrated action, the Attorney Generals of New York, Maryland and Massachusetts brought lawsuits in their respective state courts against Volkswagen for civil penalties and injunctive relief under each state’s environmental laws.76 The New York case, for example, is based, inter alia, on violations of 6 NYCRR (New York Code, Rules and Regulation) §§ 200.3, 200.9, 211.1, 218-2.1, 218-6.2, and 218-11.1. Under New York Environmental Conservation Law ECL § 71-2103(1) each violation can lead to a civil penalty of up to $18,000 and an additional penalty of up to $15,000

75 For details see the amended complaint available at: https://oag.ca.gov/system/files/attachments/press_releases/VW%20Complaint%20(conformed).pdf
for each day the violation continues. Accordingly, this lawsuit may also prove to be very expensive for Volkswagen.

5. Preliminary findings
A common opinion in the European public is that consumers in Europe are much better protected against the wrongdoing of big companies than consumers in the US. In particular, in the context of the TTIP (Transatlantic Trade and Investment Partnership) negotiations between the US and the EU, consumer organizations voiced their fear that the trade agreement would substantially lower consumer protection standards in Europe.\textsuperscript{77} However, the Volkswagen case shows that consumers in Europe may not be better protected at all. Firstly, the stricter US standards with regard to nitrogen oxide emissions of vehicles and stricter testing mechanisms prior to the admission of a new model show that not even ex-ante protection of consumers is necessarily better in Europe. Secondly, even if it might be true that the ex-ante standards set by the European Union sets higher standards for the benefit of consumers in some regards (e.g. information duties of businesses prior to the conclusion of a contact, inclusion of standard contract terms to a contract),\textsuperscript{78} the protection against the violation of these standards is certainly less developed than it is in the US. While in the US the use of the class action procedure and the determined approach of various governmental agencies have resulted in significant consumer compensation and in significant compensation for the harm caused to the environment, Volkswagen is thus far not facing any substantial financial consequences for their deception in Europe. Consequently, one might argue that the high consumer protection standards that are valued all over Europe are sometimes not worth the paper they are written on, as companies can violate them without having to fear any major consequences. Accordingly, it would seem that the current debate should rather focus on how to develop and enforce consumer remedies more efficiently than arguing about the importance of maintaining or further expanding ex-ante protection via standard setting. In order to validate this claim it seems to be necessary to analyse whether the positive outcome of the Volkswagen case settlement (fast settlement, strong remedies for the consumers) was just a single, non-representative incident or if the interplay of the involved agencies and class action settlements in the US always provide a more efficient outcome compared to the German and other European systems.

\textsuperscript{77} See: https://www.ft.com/content/1b2942a0-328f-11e3-b3a7-00144feab7de.
\textsuperscript{78} Cf. e.g. Gilson, Sabel and Scott, Text and Contract: Contract interpretation as contract design, 100 Cornell Law Review 23, 2014.