

Class Member Lacks Standing to Appeal Fees to Class Counsel

October 19, 2011 by [Sean Wajert](#)

Last week, the First Circuit dismissed for lack of standing a class member's challenge to the significant fee award to class counsel in the Volkswagen AG/Audi AG MDL. [In re Volkswagen and Audi Warranty Extension Litigation](#), MDL No. 1790.

The MDL included litigation over alleged oil sludge buildup in engines in the vehicles, and involved about 480,000 cars. The parties reached a [settlement](#) under which the automakers had agreed to cover the sludge-related maintenance costs for owners or lessees of Audi A4s from certain model years and Volkswagen Passats from specific model years, if the owners could document required oil changes.

The court also approved an award of \$30 million in fees to the firms representing the plaintiffs, which drew the fire of class member Ashley Birkeland. Her appeal of this issue was rejected last week, however, by the 1st Circuit, which dismissed for lack of standing. The court concluded that appellant suffered no redressable injury from the fee award. She did not allege, for example, that class counsel sold the class short as part of a collusive fee agreement. See *Glasser v. Volkswagen of America, Inc.*, 645 F.3d 1084, 1088-89 (9th Cir. 2011). Nor did she allege any improper supplemental agreement between plaintiffs counsel and defendant. Cf. *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 726 & n.4 (3d Cir. 2001).

The court held that Fed. R. Civ. P. 23(h)(2) does not effectively confer standing to appeal on such appellants. "The district court's jurisdiction to review fee applications with the input of objectors is one thing; our appellate jurisdiction is another."

The court's reasoning seemed to reflect the view that the defendants, Volkswagen and Audi, and not class members, would be paying class counsel's fees -- implicitly rejecting the notion that such settlements are a zero-sum game based on a total that a defendant is willing to pay (and calculates it will have to pay in total), so every dollar in fees is a dollar less to the class members.