

<b>Commonwealth of Virginia</b>		
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<b>Administrative Law Advisory Committee</b>		

## Meeting Summary

### **Work Group on *Volkswagen of America, Inc. v. Smit*** **House Room 2, The Capitol** **August 16, 2010, 12:00 P.M.**

**Members Present:** Mike Quinan, Chris Nolan, Eric Page, Tom Lisk, Angela Bowser

**Staff Present:** Elizabeth Palen, Jillian Malizio

#### I. Welcome and Call to Order

**Mike Quinan**, Chair

- The meeting was called to order at 12:03 P.M.
- We are not here today to debate the details of the case, but to address the question of whether the case has an impact that goes beyond its specific factual situation and affects agencies other than the Department of Motor Vehicles (DMV). We must then answer the question, if such an impact does exist, should ALAC issue recommendations to other agencies?
- Does this case have significance beyond its facts? Other agencies will not run up against the facts presented in this case. For example, the number of Passats or Jettas in stock, but it seems that the case may have a broader impact on other agencies, who like the DMV, may not have issued regulations despite enabling statutory language.

#### II. Discussion of Case

Implications on agencies and regulatory law

- **Mike Quinan**—*What do you think about the case and how it will impact other agencies and the DMV?*
- **Eric Page**—*I think the case does have significance on other agencies. What would be the basis for someone saying it doesn't have a broader applicability?*
- **Mike Quinan**—*Their argument is that the case is very fact specific. The basis of the argument is that the ruling was reliant on a particular situation where you were dealing with a certain number of Volkswagens—the outcome of the case was dictated by the facts.*
- **Tom Lisk**—*I think the issue needs to be approached from a different viewpoint. The authorizing statute empowered the commissioner to come up with regulations. The*

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*commissioner chose not to use that power. The majority talks about that in the opinion. The failure of the agency to issue guidance documents or regulations—that has import across a number of state agencies.*

- **Chris Nolan**—*That was the thing that struck me the most, that was the key point. At the meeting of the Code Commission in July, when we presented the work plan, some of the members felt that this could have larger context to other agencies. We were encouraged to look for broader themes. Maybe A possible option for ALAC may be to notify the agencies of Virginia Supreme Court’s ruling in this case and tell them if you don’t issue regulations you can be subjected to the same arguments that the DMV was.*
  - *I suspect there are statutes in the code that authorize agencies to promulgate regulations and the regulations are not made.*
  - *I don’t think it’s our job to comb the code for every statute and regulation, but I think we should highlight this issue for agencies.*
- **Eric Page**—*That is exactly what I thought we should do. I understand that the case is fact intensive, but it does have broad applicability. We could advice agencies to look at their statutes. We can help them do all they can to prevent the same type of problem from arising.*
- **Mike Quinan**—*There are two significant issues. The first is the absence of regulations promulgated by an agency when the statute authorizes them. Second, that the statute uses the concept of fairness or equity to be applied.*
  - *What I have in mind is an email from ALAC to state agencies, that says here is the case in a nutshell, here are the issues raised: the first is the enforceability of statutes that employ standards like fairness/equity, and the second is the failure of agencies to enact regulations when they have statutes that enable them.*
- **Eric Page**—*We should get the stakeholders together, and let them know what we are thinking of doing.*
- **Mike Quinan**—*How would we go about doing that?*
- **Elizabeth Palen**—*ALAC would first draft a memo, we could then organize a meeting with a couple of representatives from the Attorney General’s office and possibly Martin Kent from the Executive branch.*
- **Mike Quinan**—*Did anyone see issues in the case other than the ones we’ve identified?*
- **Eric Page**—*The court was clear in saying that just because a statute uses “equitable” language does not mean it will be vague as applied. We may want to alert agencies to the courts discussion and advice them to look at their statutes.*
- **Mike Quinan**—*I will take a shot at the memo and then circulate it by email.*
  - *Roger Chaffe could not join us today, but he discussed his thoughts with me and I offer them to you second hand. He believes that the case is fact specific and of little applicability outside of that context.*
- **Eric Page**—*This opinion was narrowly written, however, it can have broad consequences.*
- **Mike Quinan**—*The important message for agencies is that failing to issue regulations when you are required to do so may have an impact on the enforceability of the statute.*

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- **Tom Lisk**—*Some agencies work to avoid issuing regulation. The APA is perceived as such a burden that they do everything to avoid the process.*
- **Elizabeth Palen**—*A particular agency can be exempt for issuing regulations.*
- **Angela Bowser**—*Usually the exemption is tied within a certain amount of time that the act becomes effective. Which doesn't mean they can't go back and have something amended.*

### **III. Adjourn**

- **The meeting adjourned at 12:33 P.M.**

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