NINTH CIRCUIT U-TURNS AND APPROVES NATIONWIDE CLASS SETTLEMENT IN AUTOMOBILE CLASS ACTION INVOLVING POTENTIAL VARIATIONS IN STATES' LAWS

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Consumer Financial Services Litigation Alert

In a recent 8-3 en banc decision, the Ninth Circuit affirmed the district court's approval of an estimated $210 million class action settlement in *In re Hyundai and Kia Fuel Economy Litigation.[*1] The *Hyundai* decision is significant because it reversed an earlier, controversial decision by a three-judge panel of the Ninth Circuit, which rejected the nationwide settlement because the district court failed to "rigorously analyze potential differences in state consumer protection laws" before certifying the class for settlement.[2] The Ninth Circuit's en banc decision offers some clarity for both plaintiffs and defendants attempting to settle class action litigation in the Ninth Circuit, especially those involving proposed nationwide classes.

The *Hyundai* decision arose from multidistrict litigation in which plaintiffs from across the United States asserted state law claims based upon the allegedly false advertised fuel efficiency of the defendants' automobiles.[3] Although the district court tentatively denied plaintiffs' initial efforts to certify a class, defendants and most plaintiffs eventually agreed to a nationwide class settlement.[4] The relief to be provided to class members was substantial; the district court estimated the value of the relief at $210 million.[5] Following preliminary approval of the class settlement, numerous class members (the "Objectors") filed objections, arguing, among other things, that material differences in the applicable states' laws defeated the predominance requirement of Rule 23(b)(3) and precluded certification.[6] Over the objections, the district court certified the nationwide class for settlement purposes and entered final approval of the settlement.[7] The Objectors appealed to the Ninth Circuit.

THE EARLIER PANEL DECISION

In January 2018, a three-judge panel of the Ninth Circuit reversed the certification of the nationwide settlement class, based primarily on the district court's failure to "rigorously analyze potential differences in state consumer protection laws."[8] The three-judge panel held that conducting such an analysis was necessary to assess whether common questions predominated over individual ones, a requirement that "preexists any settlement."[9] The three-judge panel also rejected the "mistaken assumption that the standard for certification [i]s lessened in the settlement context" and admonished district courts that they "must give 'undiluted, even heightened, attention in the settlement context.'"[10] The three-judge panel's decision created some level of uncertainty as to the standards governing certification of settlement classes, including whether a nationwide, multi-state-law class

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could ever be certified for settlement purposes in the Ninth Circuit. In July 2018, the majority of the Ninth Circuit voted to vacate the three-judge panel decision and rehear the case en banc.[11]

THE RECENT EN BANC DECISION

On June 6, 2019, the Ninth Circuit, sitting en banc, reversed course and affirmed the certification and approval of the nationwide settlement class. The Ninth Circuit began by holding that "[t]he criteria for class certification are applied differently in litigation classes and settlement classes," including that "[trial] manageability is not a concern in certifying a settlement class where, by definition, there will be no trial."[12] Accordingly, when assessing predominance for "a settlement only class, 'a district court need not inquire whether the case, if tried, would present intractable management problems.'"[13] Manageability, in other words, remains crucial to assessing certification in the litigation context, but is less important in assessing a settlement class.[14] Indeed, the *Hyundai* court recognized that a "class that is certifiable for settlement may not be certifiable for litigation if the settlement obviates the need to litigate individualized issues that would make a trial unmanageable."[15]

Applying these principles, the Ninth Circuit affirmed the district court's decision that common issues predominated and Rule 23(b)(3) was satisfied.[16] As a means to side step the application of multiple states' laws, the *Hyundai* court held that "[s]ubject to constitutional limitations and the forum state's choice-of-law rules, a court adjudicating a multistate class action is free to apply the substantive law of a single state to the entire class."[17] In this case, Ninth Circuit held, no party had argued that California's choice-of-law rules did not apply, and thus those rules applied "[b]y default" because no party established the application of another state's law.[18] Similarly, the Objectors did "not suggest that application of California law gives rise to any constitutional problems."[19] In fact, "no objector argued that differences between the consumer protection laws of all fifty states precluded certification of a settlement class."[20] Given the "lack of analysis" advanced by the Objectors, the Ninth Circuit held that decertification of the settlement class was inappropriate.[21]

In further support, the Ninth Circuit relied on its 1998 decision in *Hanlon v. Chrysler Corp.,* 150 F.3d 1011 (9th Cir. 1998). The court summarized *Hanlon* as rejecting the argument that "'the idiosyncratic differences between state consumer protection laws' defeated predominance" where claims revolved around a common nucleus of facts and upholding "the longstanding rule that 'differing remedies' do not preclude class certification."[22] The Ninth Circuit explained that *Hanlon*'s analysis applied "with even greater force" to the *Hyundai* class settlement "where the class claims turn on the automakers' common course of conduct—their fuel economy statements—and no objector established that the law of any other states applied."[23]

On these bases, the Ninth Circuit affirmed the district court's finding that common issues predominated for the settlement class and, at the same time, rebuffed the limitations the three-judge panel attempted to impose on nationwide class settlements.

DRIVING AHEAD – THE POTENTIAL IMPACTS OF THE EN BANC DECISION

The Ninth Circuit's *Hyundai* decision provides clarity for parties and practitioners seeking to settle complex, multi-state class actions in the Ninth Circuit. The decision also brings the Ninth Circuit back in line with other circuits and avoided a potential a circuit split if the panel decision had been upheld.[24] The Ninth Circuit's decision,

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however, may be a mixed bag for companies defending nationwide class actions. On the one hand, the *Hyundai* decision eases the ability of a class defendant to reach a global resolution of nationwide claims by removing the significant hurdles the three-judge panel imposed in its now-vacated decision. On the other hand, in seeming to ease the burden to obtain class certification of nationwide settlement classes, the *Hyundai* decision may provide ammunition to plaintiffs' counsel seeking class certification outside the settlement context. In response to this last point, it bears repeating that the Ninth Circuit distinguished the class certification standards in the settlement and litigation contexts several times and made clear that "[t]he criteria for class certification are applied differently in litigation classes and settlement classes," such that its application should be limited to the proposed classes that parties jointly present for certification as part of a settlement.[25]

NOTES

[1] ---F.3d---, 2019 WL 2376831 (9th Cir. June 6, 2019).

[2] *Id.* at *4 ("A divided three-judge panel of this court vacated the class certification decision and remanded, holding that by failing to analyze the variations in state law, the district court abused its discretion in certifying the settlement class.").

[3] *Id.* at *2.

[4] *Id.* at *3.

[5] *Id.* at *20.

[6] *Id.* at *4, 9-13.

[7] *Id.* at *4.

[8] *In re Hyundai & Kia Fuel Econ. Litig.,* 881 F.3d 679, 702 (9th Cir. Jan. 23, 2018). For a more detailed summary of the now-vacated decision by the three-judge panel, please refer to our prior alert at: http://www.klgates.com/no-rubber-stamp-ninth-circuit-reverses-certification-of-nationwide-class-settlement-due-to-failure-to-account-for-variations-in-state-law-02-06-2018/.

[9] *Id.*

[10] *Id.* at *13–14.

[11] *In re Hyundai And Kia Fuel Econ. Litig.,* 897 F.3d 1003 (9th Cir. 2018) (granting rehearing en banc).

[12] *Id.* at *5.

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[13] *Id.* at *6 (quoting *Amchem Prod., Inc. v. Windsor,* 521 U.S. 591, 620, 117 S. Ct. 2231, 2248, 138 L. Ed. 2d 689 (1997)).

[14] *Id.* at *6-7.

[15] *Id.* at *7.

[16] *Id.* at *9-13.

[17] *Id.* at *9.

[18] *Id.*

[19] *Id.* at *10.

[20] *Id.*

[21] *Id.* The Ninth Circuit also distinguished its prior decision in *Mazza v. Am. Honda Motor Co.,* 666 F.3d 581 (9th Cir. 2012), because in that case (1) the defendant had "exhaustively detailed the ways in which California law differs from the laws of the 43 other jurisdictions and showed how applying the facts to those disparate state laws made a difference in this litigation" and (2) *Mazza* was certified "for litigation purposes" such that "the separate laws of dozens of jurisdictions presented a significant issue for trial manageability, weighing against a predominance finding." *In re Hyundai & Kia Fuel Econ. Litig.,* 2019 WL 2376831, at *10 (internal quotations omitted).

[22] *In re Hyundai & Kia Fuel Econ. Litig.,* 2019 WL 2376831, at *11 (quoting *Hanlon,* 150 F.3d at 1022-23).

[23] *Id.*

[24] As Justice Nguyen recognized in her dissent to the prior panel decision, the now-vacated panel decision would have created a circuit split as to the predominance element and who bears the burden of proving which law applies. *In re Hyundai & Kia Fuel Econ. Litig*., 881 F.3d at 712-13 (quoting *Sullivan v. DB Investments, Inc.,* 667 F.3d 273, 301 (3d Cir. 2011)).

[25] *Id.* at *5.

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