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Design defect class actions: split Ninth Circuit panel affirms exclusion of common defect expert testimony

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Takeaway: Federal appellate courts review a district court's rulings on motions for class certification and to exclude expert testimony for an abuse of discretion. The Ninth Circuit's recent decision in *Grodzitsky v. American Honda Motor Co., Inc.*, 957 F.3d 979 (9th Cir. 2020), shows that, on appeal, a party really needs to be on the right side of that standard of review, given the panel's 2-1 decision affirming the district court's exclusion of expert testimony and denial of class certification. While that particular majority – composed of Circuit Judge Johnnie Rawlinson and Jed Rakoff (from the Southern District of New York, by designation) – affirmed the district court, the dissenting opinion of Circuit Judge Mary Murguia shows that, with a different panel, the decision on appeal could have gone the other way.

In *Grodzitsky*, plaintiff Phyllis Grodzitsky alleged a design defect in the power windows installed in Honda Pilots. Specifically, plaintiff alleged that the window regulators – the mechanical assemblies that move windows up and down – could not support the windows, causing them to fall into the vehicles' doorframes. Based on this alleged defect, plaintiff asserted claims under California's Consumer Legal Remedies Act and Unfair Competition Law, seeking to represent a class of vehicle buyers and lessees of 2003 through 2008 Honda Pilots (a class involving over 400,000 allegedly defective regulators).

Plaintiff moved for class certification, relying on the expert testimony of Glenn Akhavein, who "opined that Honda window regulators were not sufficiently durable when exposed to vibrations at certain frequencies." *Id*. at 982. Akhavein's testimony was critical to plaintiff's effort to establish a common design defect, "as the remaining evidence consisted solely of highly individualized complaints." *Id*. at 987.

Honda opposed class certification and also moved to exclude Akhavein's testimony. The district court excluded the expert testimony on Daubert grounds and likewise denied class certification, ruling that Grodzitsky could not establish commonality under Rule 23 without the expert testimony. *Id*. at 984.

Without belaboring all of the details of Akhavein's opinion, Judge Rawlinson's majority opinion concluded that his expert testimony was doomed by a number of concessions made during his expert deposition: "Akhavein stated that the regulators had a 'common defect' because they were not 'durable enough' to 'last the life of the vehicle,' [even though there was no industry standard for such a proposition] conceded that he was unable to identify a 'common solution' to the purported defects in the regulators, and confirmed that he had no opinion concerning the proper manufacturing method that should have been utilized by Honda." *Id*. at 986. He also conceded there was no "direct correlation" between the "vibration testing" he conducted and his opinion about durability. *Id*. Accordingly, "Akhavein did not and could not provide a reliable opinion demonstrating a common defect for over 400,000 regulators." *Id*.

In her dissent, Judge Murguia agreed that portions of Akhavein's testimony should have been excluded, but that aspects of his opinion were admissible and "may have critically supported Plaintiffs' motion for

class certification." *Id*. at 987-88 (Murguia, J., concurring in part and dissenting in party). There is certainly support for such a proposition. *See id.* at 988 (citing and quoting *Reed v. Lieurance*, 863 F.3d 1196, 1208–09 (9th Cir. 2017) ("While the district court may have had a proper basis to exclude portions of the expert report in its discretion, ... the district court abused its discretion in excluding the entirety of [the expert's] testimony[.]")) According to Judge Murguia, "the district court went too far when it excluded even those of Akhavein's opinions that were rooted in first-hand observations and testing —including his opinion that the regulators were designed in a way that made them susceptible to failure as well as his basic opinion regarding the vibrational frequencies that the regulators would be exposed to with normal vehicle use." *Id*.

The opinion features the typical "cross-criticism" between the majority and the dissent, with Judge Murguia observing, for example, that the majority "notably fails to explain with any level of specificity" how it came to the conclusion that aspects of Akhavein's testimony had "no scientific basis." *Id*. at 988-89. While the majority opinion may not be a model of clarity, the district court catalogued what it concluded were defects in Akhavein's methodology, and that was enough to carry the day with the majority under an abuse of discretion standard of review.