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Certifying a Settlement Class: What's Good for the Goose Has to be Good for the Gander

by John Neeleman

Late last month, in *In re Hyundai & Kia Fuel Economy Litigation*, 881 F.3d 679 (9th Cir. 2018) (*Hyundai*), a divided Ninth Circuit panel reversed the district court's approval of a proposed nationwide class settlement valued at over $200 million. This decision, upending a settlement in multidistrict litigation alleging that Hyundai and Kia misstated the fuel efficiency of their vehicles, held that where plaintiffs bring a nationwide class action under the consumer protection laws of a single state, a district court must consider the impact of potentially varying state laws. *See id.* at 691 ("[i]n a multi-state class action, variations in state law may swamp any common issues and defeat predominance") (quoting *Castano v. American Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996)).

But the salient element of the court's decision may be the edict that a district court must be even more rigorous in applying Rule 23 standards to a proposed settlement class than to a proposed litigation class. As a practical matter, this effectively renders it impossible to certify a settlement class after a district court has denied certification. So if a settlement is in the works, the parties should consider postponing the resolution of a class certification motion. If the parties do not secure a stay and the court denies certification, objectors may be able to rely on arguments successfully advanced by the defendant against class certification in support of their objections to a proposed class settlement.

The case began in California state court as a single class action (*Espinoza*) that was removed to the Central District of California. The *Espinoza* court issued a tentative ruling on a pending motion for class certification, indicating that the plaintiffs would not be able to pursue a nationwide class under California law.

In doing so, the district court performed the "predominance inquiry" applied by the Ninth Circuit in *Mazza v. American Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012), which the *Hyundai* majority described as a "closely analogous" case. 881 F.3d at 692. In *Mazza*, Honda contended the district court erred in certifying a nationwide class under Rule 23(b)(3), because "California's consumer protection statutes may not be applied to a nationwide class with members in 44 jurisdictions." *Id.* at 692 (quoting *Mazza*, 666 F.3d at 589). Agreeing with Honda, *Mazza* reversed the district court based on the three-step analysis required by California's choice of law (its "governmental interest") test: (1) whether there were material differences between applicable California law and the analogous laws of other states; (2) whether another state where the car sales at issue took place "has a strong interest in applying its own consumer protection laws to those transactions"; and (3) whether "if California law were applied to the

entire class, foreign states would be impaired in their ability to calibrate liability to foster commerce." *Id*. at 693 (quoting *Mazza*, 666 F.3d at 592-93). Based on this analysis, *Mazza* concluded that "each class member's consumer protection claim should be governed by the consumer protection laws of the jurisdiction in which the transaction took place," and thereby reversed the district court's certification grant. *Id*. (quoting *Mazza*, 666 F.3d at at 594).

Applying this same framework in *Espinosa*, the district court tentatively ruled it could not certify a class for trial. Defendants' evidence, according to the district court, "unquestionably demonstrates that there are material differences as between the various states' laws that would 'make a difference in this litigation'." *Id*. at 696 (quoting *Mazza*, 666 F.3d at 590–91). The district court also found that (as in *Mazza*) each of the states "has an interest in balancing the range of products and prices offered to consumers with the legal protections afforded to them." *Id*. (quoting *Mazza*, 666 F.3d at 592). Finally, the district court determined that "the interests of the other states would be more impaired were California law imposed upon their citizens than California would be impaired were this action limited to a class of only California consumers." *Id*. Therefore, the district court's tentative ruling found "that certification of a nationwide class where California law is applied to out-of state consumers is foreclosed by the Ninth Circuit's decision in *Mazza*, a case virtually on all fours with the instant matter." *Id*.

However, before the district court could finally rule on Espinosa's class certification motion, the Judicial Panel on Multidistrict Litigation transferred a number of other class actions to the Central District of California to be consolidated with *Espinosa*. Approximately one week after the MDL judicial panel issued its first transfer order (consolidating twelve other cases with *Espinoza*), the *Espinosa* plaintiffs and the plaintiffs in two of the other class actions informed the district court that they had reached a settlement with Hyundai for a nationwide class. Shortly thereafter, the parties informed the court that Kia had also agreed to the same settlement terms as Hyundai.

Contrary to its tentative ruling denying class certification for trial, the district court granted the plaintiffs' motion for certification of the settlement class. This time the district court determined that the "extensive choice of law analysis" required if the case were going to trial was not necessary in the settlement context. In so ruling, the trial court rejected objections it had received to certification of the settlement class "on the grounds that Virginia law provides a materially different remedy to Virginia consumers" for certain claims, reasoning the state law variations could be addressed as part of the final fairness hearing under Rule 23(e).

The Ninth Circuit reversed, stating, "[i]f anything, this case highlights the reasons underlying *Amchem*'s warning that district courts must give 'undiluted, even heightened, attention in the settlement context' . . . to scrutinize proposed settlement classes." *Id*. at 702 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997)). The Ninth Circuit's primary concern appears to have been that once the district court states that it is unwilling to certify a class for trial, an ensuing settlement is unlikely to be arm's length: "Because the district court made clear that it would be unlikely to certify the same class for litigation purposes, the class representatives were well aware that they would be unlikely to succeed in any efforts

to certify a nationwide litigation class." *Id*. at 702-03. "Accordingly, '[c]lass counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer, and the court [faced] a bargain proffered for its approval without benefit of adversarial investigation.'" *Id*. at 703 (quoting *Amchem*, 521 U.S. at 621).

The choice-of-law analysis, moreover, was not precluded by a fairness hearing: "[A] fairness hearing under Rule 23(e) is no substitute for rigorous adherence to those provisions of the Rule designed to protect absentees[.]" *Id*. (quoting *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 849 (1999)).

The panel then considered the issue of a California-only class, because the objectors to the settlement raised an issue as to the inclusion of used car owners in the settlement class, given that it was unlikely that any of them were exposed to and could have relied on Hyundai's and Kia's deceptive statements. The panel ruled that the district court's inclusion of used car owners in the settlement class was another error requiring reversal: "because the record does not support the presumption that used car owners were exposed to and relied on misleading advertising, the district court had an obligation to define the relevant class 'in such a way as to include only members who were exposed to advertising that is alleged to be materially misleading.'" *Id*. at 705 (quoting *Mazza*, 666 F.3d at 596).

The panel ended its analysis of the certification decision by emphasizing a district court's "heightened" obligation to analyze the Rule 23 prerequisites in the class settlement context, concluding: "[b]ecause our precedent raises grave concerns about the viability of a nationwide class in this context, *see Mazza*, 666 F.3d at 596–97, this certification decision cannot stand." *Id*.

Circuit Judge Nguyen gave an impassioned dissent, asserting that "the majority relies on arguments never raised by the objectors, contravenes precedent, and disregards reasonable factual findings made by the district court after years of extensive litigation." *Id*. at 708 (Nguyen, J., dissenting). She further warned that "[t]he majority also deals a major blow to multistate class actions." *Id*.

We anticipate that a petition for rehearing will be filed.