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Split Ninth Circuit panel affirms denial of certification of class challenging Progressive's "projected sold adjustment," with dissenting judge calling for en banc review

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We have written before about class actions challenging the "projected sold adjustment" utilized by insurance companies to calculate the "market value" of totaled vehicles. *See* Seventh Circuit rejects claimed "methodological" duty in reversing class certification of totaled car valuation dispute; Eleventh Circuit reverses dismissal of class action disputing State Farm's calculation of "actual cash value," holding required appraisal process not a condition precedent to suit. A split panel of the Ninth Circuit has now weighed in, with the majority affirming the district court's denial of class certification while a dissenting judge urged the full Ninth Circuit to rehear the case en banc. *Ambrosio v. Progressive Preferred Ins. Co.*, --- F.4th ----, No. 24-2708, 2025 WL 2628179 (9th Cir. Sept. 12, 2025).

As with similar class actions, the *Ambrosio* plaintiffs challenged Progressive's use of a "projected sold adjustment" or "PSA"—a "reduction to the list prices of comparable vehicles to reflect consumer purchasing behavior (negotiating a different price than the listed price)"—in determining market value for totaled vehicles. 2025 WL 2628179, at *2. Plaintiffs alleged that use of the PSA "always resulted in an inherently flawed negative line-item adjustment" that failed to consider the reasons for a below-price sale (such as "inapplicable military or promotional discounts") and excluded as "outliers" vehicles sold "above the list price." *Id.* Based on these allegations, plaintiffs alleged claims for breach of contract, breach of the covenant of good faith and fair dealing, unjust enrichment, and declaratory relief. *Id.*

In denying plaintiffs' motion for class certification of all insureds to whom Progressive applied a PSA in calculating the market value of totaled vehicles, the district court found plaintiffs had met the Rule 23(a) requirements for certification but denied certification under Rule 23(b)(3) because "individual questions surrounding the calculation of each [plaintiff's] [actual cash value] predominated." *Id.* A split Ninth Circuit affirmed, with Judge Hawkins writing the majority opinion (joined by Judge Nelson) and Federal Circuit Judge Wallach (sitting by designation) dissenting.

The majority's predominance analysis compared the Ninth Circuit's auto insurance policy decisions in *Lara v. First National Insurance Company of America*, 25 F.4th 1134 (9th Cir. 2022), and *Jama v. State Farm Mutual Automobile Insurance Company*, 113 F.4th 924 (9th Cir. 2024). In *Lara*, the Court of Appeals affirmed the denial of class certification because the insurer only owed a duty to pay "'actual cash value'" and "'if a putative class member was given that amount or more, then he or she cannot win on the merits.'" *Id.* at *3 (quoting 25 F.4th at 1139). In contrast, the *Jama* decision reversed the denial of certification of a class claim challenging an insurer's "'negotiation adjustment'" because Washington state law "explicitly prohibited the use of 'negotiation adjustments'" and thus the *Jama* plaintiffs could "measure their injuries on a class-wide basis by adding back the amount of the facially unlawful deduction." *Id.* (citing 113 F.4th at 933).

Unlike in *Jama*, governing Arizona state law did not render Progressive's use of the PSA "facially unlawful." *Id.* at *4. In determining implementation of the PSA did not create "common evidence of liability," the *Ambrosio* court found (1) the "remainder of the insurance policy does not explicitly prohibit the use of the PSA"; (2) the mere "existence of the PSA does not necessarily indicate measurable damages, which is required to prove a breach of contract in Arizona"; and (3) Progressive is entitled to "'invoke individualized issues and provide sufficient evidence that the individualized issues bar recovery on at least some claims, thus raising the spectre of class-member-by-class-member adjudication of the issue.'" *Id.* (quoting *Van v. LLR, Inc.*, 61 F.4th 1053, 1067 (9th Cir. 2023)). Because Progressive had presented evidence that at least some members of the putative class had received a higher market valuation via Progressive's process "than they would have from other sources"—such as the National Automotive Dealers Association ("NADA") and Kelley Blue Book ("KBB")—class certification was not appropriate. *Id.*; *see also id.* at *5 (describing the record as indicating that "the first step in a market value appraisal is to examine a nationally recognized valuation guide like NADA or KBB").

Thus, the *Ambrosia* plaintiffs faced "the same problem that the prospective class members in *Lara* faced" because determining whether each class member had been harmed "'would involve an inquiry specific to that person.'" *Id.* (quoting 25 F.4th at 1139). Accordingly, the district court did not abuse its discretion in denying certification. *Id.*

Judge Wallach dissented, decrying what he viewed as "not only . . . a conflict amongst the circuits," but also "one within this circuit." *Id.* (Wallach, J., dissenting). First, Judge Wallach disputed that the policy authorized use of the PSA, because its terms did not authorize any "other inputs" to determine actual cash value other than "'market value, age, and condition of the vehicle at the time the loss occurs.'" *Id.* at *6 (citation omitted). Second, Judge Wallach would have found use of the PSA constitutes a breach of a "methological duty" to calculate actual cash value properly because Progressive acknowledged "that PSA is solely a downward adjustment and excludes transactions where cars sold for above list price." *Id.* at *6-8. Third, Judge Wallace took issue with his read of the majority's holding as "actual breach by underpayment is not an injury if hypothetical performance through another method could have resulted in even less payment to Plaintiffs." *Id.* at *8. Judge Wallach went

on to dispute the district court's and the majority's conclusion that the policy would have authorized use of NADA or KBB to determine actual cash value, describing the majority as relying on a "cherry-picked citation to Plaintiffs' expert's deposition." *Id.* at *9.

Regarding the conflict amongst the circuits, the dissenting opinion identified the following pro-certification rulings: (1) decisions of the Eleventh and Tenth Circuits denying interlocutory review of class certification rulings in other cases challenging Progressive's PSA; (2) federal district court decisions certifying Progressive PSA classes from the Sixth, Second, and Eleventh Circuits; and (3) a decision of the Ohio Court of Appeals affirming certification of a Progressive PSA class. *Id.* at *11. Conversely, the Third, Seventh, and Fourth Circuits had granted interlocutory review of and reversed certification of Progressive PSA classes, with one judge dissenting from the Fourth Circuit's decision. *Id.*

Regarding the conflict within the Ninth Circuit, Judge Wallach disagreed with the majority's characterizations of the differences between *Lara* and *Jama*. *Id.* at *12-13. According to the dissent, the *Lara* plaintiffs merely challenged "an insurer's failure to itemize deductions such that they could be verified as required by Washington state law." *Id.* at *12 (citing 25 F.4th at 1137). And contrary to the majority, the dissent viewed the policy provisions describing the proper calculation of actual value as equivalent to the Washington state law prohibiting negotiation adjustments in *Jama*. *Id.* (citing 113 F.4th at 928, 931, 932). Judge Wallach also noted that the Seventh Circuit itself had recognized the conflict between *Lara* and *Jama*. *Id.* at *13 (citing *Schroeder v. Progressive Paloverde Ins. Co.*, 146 F.4th 567, 578 (7th Cir. 2025)). Finally, Judge Wallace opined that the majority decision's reliance on the presence of uninjured class members to defeat class certification created a further intra-Circuit conflict by "short-circuit[ing] the Ninth Circuit's en banc *Olean* holding." *Id.* (discussing *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 (9th Cir. 2022) (en banc)).

Takeaway: As one might expect in light of Judge Wallach's vigorous dissent, the *Ambrosio* plaintiffs promptly moved for rehearing en banc. *See Ambrosio, et al. v. Progressive Preferred Ins Co., et al.*, No. 24-2708, Pet. for Reh'g (9th Cir. filed Sept. 26, 2025). The prior *Olean* en banc decision, involving 11 judges in accordance with Ninth Circuit Rule 35-3, came down 9-2 in favor of class certification. Because all 29 judgeships for the Ninth Circuit currently have been filled, however, a possibility exists for a different en banc court of 11 judges to disagree with *Olean*, particularly on the hotly disputed question of whether a class properly can include uninjured class members. If that occurs, the highly unusual possibility of a true "full court" rehearing may occur. *See* 9th Cir. R. 35-3 ("In appropriate cases, the Court may order a rehearing by the full court following a hearing or rehearing en banc.").