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CLASS ACTION BLOG

Ninth Circuit En Banc Reverses Panel and Approves The Nationwide Class Action Settlement Of MDL Cases Regarding Vehicle Fuel Economy Misrepresentations.

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Most class action cases are complex. Whenever multiple class actions are joined in an MDL, the complexity is greatly increased. This blog post discusses the five consolidated appeals of an objected to nationwide class action settlement. On appeal, a divided three judge panel vacated the class certification and remanded. However, “a majority of the nonrecused active judges” voted to rehear the case en banc. That resulted in six judges joining all of the majority opinion, three judges joining the dissenting opinion, and one judge joining separate parts of the majority and dissenting opinions.

After the first class action was filed, the automakers seemingly corrected their EPA fuel economy estimates by making downward adjustments in those estimates for certain model years. They also set up a “Lifetime Reimbursement Program” before the first class certification hearing. Thereafter multiple mediations resulted in “a proposed nationwide settlement,” first with Hyundai and then with Kia. After several months of “confirmatory discovery” the settling parties obtained preliminary approval. Thereafter, multiple objections were filed and the settlement agreement was revised to respond, at least in part, to some of the “concerns” and objections raised. Before preliminary settlement approval was given, class counsel began negotiations regarding attorney’s fees which were agreed to three months later. Despite that agreement, the district court judge awarded attorney’s fees less than what some of class counsel requested and declined to award one of the objecting attorneys anything. In the judge’s opinion, that objecting attorney failed to add any benefit to the class members. The district judge issued a nineteen page order granting final approval after which several objectors appealed.

The majority opinion stressed the "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." For that reason, the Ninth Circuit performs "extremely limited" reviews of a district court's approval of a class action settlement. The majority stated that "as long as the district court applied the correct legal standard to findings that are not clearly erroneous, we will affirm." That statement telegraphed the outcome of the en banc review. The court then proceeded to note the multiple precedents stating that the review of settlement classes is relaxed compared to the review of litigation classes because the issue of "manageability at trial" is not a concern when "certifying a settlement class."

Because the objectors had only challenged the district court's findings regarding the predominance of certain issues and adequacy of representation, those were the only criteria the en banc majority addressed. Noting the Supreme Court had earlier "recognized that predominance is 'readily met' in cases alleging consumer fraud," the court found there was a "cohesive group of individuals [that] suffered the same harm in the same way because of the automakers' alleged conduct" which satisfied the predominance requirement. Although the majority acknowledged there were used car purchasers within the class definition, the court did not find "the potential individual questions of reliance for used-car purchasers predominate[d] in the context of this proposed settlement class. That some individualized issues might need to be addressed does not in and of itself defeat predominance." In addition, the majority found California's choice of law rules called for the application of California law rather than Virginia law; the objectors failed to meet their burden of showing that California law did not apply. Furthermore, the majority concluded that applying California law satisfied due process.

The majority barely touched the adequacy issue by dismissing the arguments raised regarding an alleged failure to protect the opt out rights of absent Virginia class members. The court found their rights to opt out had been protected. In addition, the court noted the contention that class counsel had a potential conflict because of "a co-counsel relationship between class counsel and defense counsel in a future, unrelated case" was not sufficient to establish inadequacy; that objector presented no law supporting the position that there was a disqualifying conflict.

The court also dismissed the notice objections by pointing out the notice provided sufficient information and the claim forms were not overly burdensome. The objection that a 21% participation rate was too low and that a "daunting claim form" was the cause was undercut because the participation rate had increased to 23% two months later and both percentages were substantially greater than other participation rates in other approved class action settlements. The majority also found that when the settlement class participation rate was combined with the "59% of class members who took advantage of the Lifetime Reimbursement Program prior to notice of the settlement," the percentage of the class members who benefited from the filing of the class actions was substantial.

In addition, the court refuted the objectors' claim that the settlement was collusive. The majority responded to the objection that the settlement was "a sweetheart deal [stating:] to the contrary, the settlement bears none of the typical signs of collusion between class counsel and defendants, such as when class counsel 'receive a disproportionate distribution of the settlement,...the agreement contains a 'clear sailing" provision for attorney's fees' separate and apart from class funds,' ...or unawarded fees revert to the defendants rather than to the class."

In short, the majority concluded that substantial relief had been provided to the class members, that the attorney's fees awards were reasonable, and that the multipliers employed by the district court were "modest or in-line with others we have affirmed" (citing other Ninth Circuit cases with much higher or similar multipliers.)

The dissent, much like the majority of the three member panel which had vacated the initial class certification settlement, did not show nearly the same deference to the district court judge's rulings. It cited In re *Warfarin Sodium Anti-Trust Litig.*, 391 F.3d. 516, 529-30 (3d Cir. 2004) which stated "that problems beyond those of just manageability may exist when a district court is asked to certify a single nationwide class action suit, even for settlement purposes when claims arise under the substantive laws of the fifty states." The dissent also cited *Hanlon v. Chrysler Corp.*, 153 F. 3d. 1011, 1022-23 (9th Cir. 1998) in support of the proposition that the Ninth Circuit had "scrutinized state law variations even when a class is proposed only for settlement in order to determine whether 'the idiosyncratic differences between state consumer protection laws' were 'sufficiently substantive to predominate over the shared claims.'" Unlike the majority, the dissenting judges were not willing to "accept on faith the parties' assertions that there are no relevant variations in state laws." Rather, they found that the "district court failed to discharge its threshold responsibility to determine what substantive body of law applied to the plaintiffs' claims before it certified the class." In addition, the dissenting judges faulted the district court for failing to fully consider the objection lodged by the Virginia plaintiffs "to the application of California law" before certifying the settlement class. According to the dissenting judges, the district court was wrong because it failed to address "whether Virginia law applied and prevented [the district court] from certifying a nationwide class that included Virginia plaintiffs."

The dissenting judges also faulted the majority for the way it handled the objection to the attorney's fees. They concluded the district court had failed in its obligation to determine whether the attorney's fees awarded were reasonable. In particular, they faulted the majority and the district court for failing to find whether the settlement truly had a value of $210 million when at least some of the objectors believed that the value was closer to $21 million. In the words of the dissent, [i]f the settlement had conferred $ 210,000,000.00 in value, as the parties originally speculated, a $ 9,000,000 total fee award might have been justified; but a court would be hard-pressed to justify such a fee award if the value conferred on the class were closer to $ 21,000,000, as the objectors contend. Even when it is 'difficult to estimate the settlement value's upper bound,' ...there is no excuse for the district court's failure to calculate a reasonable estimate after reviewing the facts and the parties' arguments."

The dissenting judges further faulted the district court for failing to resolve the objection “that the settlement provided minimal value beyond the reimbursement voluntarily offered by Hyundai and Kia.”

This case illustrates the profound problems often created when courts are asked to approve substantial settlements in sprawling class action litigation covering multiple class action cases in MDL litigation which are consolidated for settlement purposes and which generate numerous objections to that settlement. The initial vacation of the nationwide class action settlement by a three judge panel which was then essentially reversed by a divided en banc court illustrates the complexity of the issues involved and the divergence of opinion on how such cases should be handled in the district court. This dispute took place in the Ninth Circuit, one of the circuits whose class action rulings are often reviewed by the Supreme Court. Whether this case will result in a Supreme Court review to further “clarify” federal class action law is not yet known.

Case citation: Hyundai And Kia Fuel Economy Litigation