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Ninth Circuit Grants En Banc Review of Decision to Throw Out $210 Million Nationwide Class Action Settlement

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A Ninth Circuit Panel Previously Vacated a Nationwide Settlement Class

In January 2012, a California resident filed a putative class action in California state court alleging that Hyundai Motor America, Inc., had misrepresented its vehicles' fuel economy. A number of similar suits were filed later that year against Hyundai and Kia Motors, Inc., after the two companies acknowledged misstatements and announced a reimbursement program to compensate owners for additional fuel costs. In February 2013, the Judicial Panel on Multidistrict Litigation centralized those actions in the Central District of California, before the Honorable George H. Wu. Judge Wu granted final approval of a $210 million nationwide class action settlement in June 2015.

A group of objectors filed consolidated appeals. On January 23, 2018, a split three-judge Ninth Circuit panel vacated Judge Wu's order, finding that he had abused his discretion by failing to conduct a proper predominance analysis. *See In re Hyundai and Kia Fuel Economy Litigation*, 881 F.3d 679, 707 (9th Cir. 2018). Specifically, a majority of the panel found that the district court erred by failing to "apply California choice of law rules" and "make a final ruling as to whether the material variations in state law defeated predominance under Rule 23(b)(3)." Because "variations in state law may swamp any common issues and defeat predominance," the panel reasoned, "a court *must* analyze whether the consumer-protection laws of the affected states vary in material ways." Id. at 702 (emphasis added) (internal citations omitted).

Previously, class action litigants had generally understood that variations in state law would not defeat predominance for purposes of certifying a settlement class. The majority of the three-judge panel explicitly rejected this position: "The district court's reasoning that the settlement context relieved it of its obligation to undertake a choice of law analysis … is wrong as a matter of law." *In re Hyundai*, 881 F.3d at 702. Citing the Supreme Court's decision in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), the panel observed that "the district court made clear that it would be unlikely to certify the same class for litigation purposes," and, as a result, class counsel "could not use the threat of litigation to press for a better offer." *Id.* 702-703. In the panel's view, this meant that "both

class counsel and court [were] disarmed." *Id.* at 703 (internal citations omitted).

Ninth Circuit Orders *En Banc* Rehearing of Panel Decision

The panel's decision upended class action practitioners' long-held understanding of the certification of settlement classes, causing confusion and consternation among consumer and industry advocates alike. Groups ranging from the National Association of Consumer Advocates to the Association of Global Automakers argued that the decision represented a sharp departure from controlling precedent, foreclosed an important mechanism for consumers to secure redress for harms, and unnecessarily impeded the ability of businesses to fairly settle disputes with their customers.

In the Ninth Circuit, *en banc* review is still review by a panel (albeit a larger panel than the one that vacated the settlement) and the court's decision to review the *en banc* opinion does not guarantee a different outcome. Nonetheless, if the Ninth Circuit does reverse course, the court will avoid a circuit split and ease the path for nationwide settlements in multi-state class actions involving state-law claims. We will monitor developments and report when the Ninth Circuit reaches its final decision.

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