

Full 9th Circ. Hyundai Reset Gives Clarity On Class Deals

By **Linda Chiem**

Law360 (June 7, 2019, 7:09 PM EDT) -- An en banc Ninth Circuit on Thursday reset the standard for certifying consumer class action settlements, offering plaintiffs and defense attorneys reprieve from what they described as an unworkable standard requiring an intensive 50-state analysis of consumer protection laws.

The court's 8-3 en banc decision affirming a nationwide settlement in multidistrict litigation over Hyundai and Kia's misrepresentations about their vehicles' fuel efficiency overrode a split appellate panel's controversial 2018 decision nullifying the deal based on potential variations in state consumer protection laws.

Experts say the Ninth Circuit delivered a major win to both plaintiffs and class action defense attorneys by rectifying a circuit split on who bears the burden of showing that the law of multiple states applies to class claims.

"Assuming that a court can sign off, for all other reasons, on a nationwide deal that would be in everybody's interest, this puts us back to where everybody thought we were before," Michael Leffel, a partner and vice chair of Foley & Lardner LLP's consumer law, finance and class action practice, told Law360. "Everybody who wants to see a nationwide class settled is breathing a sigh of relief."

A key takeaway from Thursday's en banc decision is that when it comes to settling a nationwide class action, the primary question for the court to consider is whether the settlement is fair, experts say. And the courts shouldn't be burdened with having to do a deep dive into variations in state consumer protection laws — like they would have to if a class action were being litigated — before certifying a nationwide class just for settlement purposes.

It's also worth noting that the Ninth Circuit's existing standard requiring the more exacting state law analysis before certifying class actions that are actually being litigated and advancing toward trial remains in place, experts say.

The decision "allows class actions, even nationwide classes, to be settled on a less stringent standard than litigated classes," said William Stern, senior of counsel at Covington & Burling LLP who specializes in consumer class actions, calling the decision a win-win. "And as for litigated (contested) class certifications, the Ninth Circuit has now confirmed that the heightened standards and the 'rigorous analysis' will still apply."

Attorneys explained that in Hyundai, the Ninth Circuit treats predominance as a manageability concern, so the issue of whether to try a nationwide class using the law of a single state, multistate groupings, or the laws of all 50 states is a matter of manageability that's basically remedied by the fact that there's a nationwide deal. So if the parties reach a deal that doesn't diminish consumers' claims in other states — by offering opt-outs, for example — and includes other safeguards ensuring everyone gets a fair shake, then it clears the predominance criteria.

The Ninth Circuit said Thursday that with this case, there wasn't an obligation to do an exhaustive choice-of-law analysis, noting that "a class that is certifiable for settlement may not be certifiable for litigation if the settlement obviates the need to litigate individualized issues that would make a trial unmanageable."

It also brings the Ninth Circuit in harmony with the Third and Seventh circuits, which have treated differences in state law as generally immaterial in the context of a settlement class and not enough to defeat predominance.

The en banc Third Circuit already held in 2011's *Sullivan v. DB Investments* that "variations in the rights and remedies available to injured class members under the various laws of the 50 states do not defeat commonality and predominance" for a settlement class.

Notably, the Third Circuit said, "because we are presented with a settlement class certification, we are not as concerned with formulating some prediction as to how [variances in state law] would play out at trial, for the proposal is that there be no trial." As such, the Third Circuit concluded, it "simply need not inquire whether the varying state treatments of indirect purchaser damage claims at issue would present the type of 'insuperable obstacles' or 'intractable management problems' pertinent to certification of a litigation class."

And the Seventh Circuit previously said in 2001's *In re: Mexico Money Transfer Litigation* that state law variations did not defeat predominance for a settlement class, and that class representatives are not required to investigate or deploy every potential state-law theory.

"Given the settlement, no one need draw fine lines among state-law theories of relief," the decision said. "By relying principally on federal substantive law, the representative plaintiffs followed the pattern of antitrust and securities litigation, where nationwide classes are certified routinely even though every state has its own antitrust or securities law, and even though these state laws may differ in ways that could prevent class treatment if they supplied the principal theories of recovery."

Attorneys can now take comfort in the Ninth Circuit clarifying that the previous three-judge panel shouldn't have shifted the burden onto district courts and class counsel to prove whether the law of other states relating to the class claims is significantly different from the state where the class action is being litigated — in this case, California — and, more importantly, whether the interests of other states would be impaired by applying California law to plaintiffs from those other states.

"The controversial decision by the smaller panel essentially required a class action judge, or really the litigants, to brief a 50-state survey of similar laws before a class settlement would be approved," said Thomas C. Regan, who heads LeClairRyan's litigation and automotive industry practice groups. "Remember that we're talking about the certification of a class for the purpose of settlement. The class action complaint in these situations is only filed to get court approval of an agreement."

"While the January 2018 holding was following a solid policy, to wit, ensuring that class members who operate under a different state law are not treated unfairly, the implementation only made class settlements more expensive and more difficult to manage," Regan added. "That means longer to resolution and more expensive."

Plaintiffs and defense attorneys were in rare agreement that the previous panel's standard would only sow confusion and obstruct fair and efficient resolutions of class actions in one of the most active class action circuits. So, they're pleased that the Ninth Circuit hit the reset button.

"This decision should put to rest the idea that courts and parties must be burdened with an irrelevant analysis of far-flung laws just to have a national class action settlement approved," Christian Schreiber, a founding partner of San Francisco-based plaintiffs firm Olivier Schreiber & Chao LLP. "The panel recognized there are already ample protections in place to ensure that settlements are fair for class members."

"Class actions have been under constant attack from businesses and the courts. The last thing consumers needed was yet another impediment to getting relief from the wrongs of big companies," he added. "Consumer protection advocates should be pleased the court rejected this unnecessary burden."

The Ninth Circuit also reinforced its 1998 *Hanlon v. Chrysler Corp.*, finding that "idiosyncratic differences between state consumer protection laws" do not defeat predominance. While an objector is free to opt out of the class, he or she has no right to do so on behalf of anyone else, the court said.

However, that doesn't sit well with the objectors who hauled the Hyundai-Kia fuel economy litigation to the full Ninth Circuit.

James B. Feinman, an attorney for Virginia objectors who argued that the flawed Hyundai-Kia settlement deprived them of their rights to a presumably better recovery under Virginia law, called out the en banc majority for improperly concluding that "California recognizes that its consumer protection statutes embody a strong public policy and that 'Virginia's law provides significantly less consumer protection to its citizens than California law.'"

"This is simply not true and in our view, respectfully, this is based on an assumption, not reality," Feinman said in a statement to Law360. "We would never have pursued this litigation but for our confidence that Virginia law in this case allows a superior recovery for Virginia consumers."

"The California class action lawyers, instead of joining with us to hold Hyundai accountable under the law, fought to maintain their \$365 average recovery for each Virginian, while collecting \$9 million in fees," he added. "We do not think this is correct under the law."

The case is *In re: Hyundai and Kia Fuel Economy Litigation*, case numbers 15-56014, 15-56025, 15-56059, 15-56061, 15-56064 and 15-56067, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Breda Lund and Michael Watanabe.