Second Circuit Bounces Multistate "Natural" Class. Now, Keep An Eye On the Ninth Circuit

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Early this year, a Ninth Circuit panel upended a major nationwide class action settlement because it found that the District Court had not sufficiently considered material differences among the 50 states' relevant laws. I called that decision—now likely headed for *en banc* review--"Regrettable But Forgettable" because the district court should be able to correct the error the Ninth Circuit identified. The district court had not conducted any predominance analysis at all, which always is required, even for settlement classes. Had it done so, it very likely could have found that *for settlement purposes*, with no questions for a jury to try, variations in state law would not have been material.

Yesterday, the Second Circuit reminded us that for *litigation* classes, variations in state laws absolutely can and should tank class certification. *Langan v. Johnson & Johnson Consumer Cos.*, No. 17-1605 (2d Cir. July 24, 2018) is a "natural" case, challenging that label on two several baby-oriented bath products. The plaintiff allegedly purchased some in Connecticut and contended that 20 other states have similar consumer fraud laws. The district court certified a 21-state class, after which J&J successfully petitioned the Second Circuit, under Rule 23(f), to hear an interlocutory appeal.

J&J tried to argue that the plaintiff lacked Article III (constitutional "case or controversy") standing to sue on behalf of purchasers in other states, but the Second Circuit rejected that contention. "[A]s long as the named plaintiffs have standing to sue the named defendants, any concern about whether it is proper for a class to include out-of-state, nonparty class members with claims subject to different state laws is a question of predominance under Rule 23(b)(3), not a question of 'adjudicatory competence' under Article III." The court recognized some tension in case law over this question, but thought that Supreme Court guidance counseled treating "modest variations between class members' claims as substantive questions, not jurisdictional ones."

Looking at the question through Rule 23's "predominance" lens, however, the Second Circuit thought the District Court had been too hasty in certifying a multistate class. "Variations in state laws do not necessarily prevent a class from satisfying the predominance question," but J&J offered an extensive analysis as to why the state laws at issue differed too much for a single jury to answer all the necessary questions. Among the important differences J&J highlighted, some states require a showing of actual reliance, others require causation, and some require an actual intent to deceive. In just a single paragraph of its class certification opinion, the District Court dismissed those differences as "minor." The Second Circuit held that that the District Court's analysis was too cursory, more or less "tak[ing] the plaintiff's word that no material differences exist," which it could not do. The Second Circuit remanded the case for a more thorough analysis.

Langan and *Hyundai* stand for the same principle: District Courts always have to "rigorously analyze" the Rule 23 factors, including predominance and manageability, before they can certify a class. There is nothing wrong or inconsistent, though, in a defendant advocating against certification of a litigation class and then advocating for certification if the case later settles. Predominance and manageability in a trial context centers on what a single jury can reasonably be expected to decide. As the Supreme Court put it in *Amchem Prods. Inc. v. Windsor*, however, when a case is to be settled "the proposal is that there be no trial." The focus of the settlement analysis is fairness to absent class members—as, hopefully, the Ninth Circuit ultimately will recognize.