The Ninth Circuit's Hyundai Decision Is Regrettable But Forgettable

January 25, 2018

This week, by a 2-1 vote, a Ninth Circuit panel reversed a district court's approval of a massive class action settlement involving Hyundai's and Kia's allegedly inflated statements of fuel efficiency. The majority's long decision, over a vigorous dissent, amounted only to a "greatest hits" collection of Ninth Circuit class action and settlement skepticism. Nothing in it was new, and importantly, the panel majority Court said explicitly that the district court could approve the settlement anew upon remand.

Put another way: Settlement proponents in Ninth Circuit cases are going to have to deal with this decision in *In re: Hyundai and Kia Fuel Econ. Litig.* for the foreseeable future, but the case really did not erect any hurdles to approval that weren't already there.

Twenty years ago, when the asbestos bar proposed a multibillion-dollar, highly creative settlement of tens of thousands of asbestos cases, the Supreme Court bounced the settlement because the proposed class raised too many individual issues. The Supreme Court's holding in that case —*Amchem Prods. Inc. v. Windsor*—was that although federal judges need not consider the *manageability* of a class action trial when a settlement is proposed, a settlement class still has to satisfy Rule 23(b)(3)'s requirement that common questions "predominate" over questions that are purely individual to each class member. That a settlement would resolve a matter on fair terms is not enough if the settlement glosses over too many individualized issues.

In *Hyundai*, "there [was] no dispute that the district court" did not conduct a predominance analysis, including an analysis of what states' laws must apply to settlement class members' claims. The Ninth Circuit having previously held in another car case, *Mazza v. American Honda Motor Co.*, that a nationwide class could not be certified for litigation purposes, the district court's failure to analyze predominance in *Hyundai* was reversible error. Period, full stop. But the majority said that "[t]his does not mean that the court is foreclosed from certifying a class (or subclasses) on remand." The *Hyundai* parties will have to explain their way around *Mazza*, but may well be able to do so.

A second aspect of the Ninth Circuit's ruling, precluding a settlement class from including *used- car* purchasers because they could not have relied on Hyundai's and Kia's fuel efficiency advertisements, is pro-defense. The Ninth Circuit repeatedly has rejected class action claims premised on different advertisements that may or may not have been seen or relied upon by class members across a broad spectrum. All *Hyundai* did was say these same predominance problems can infect settlement classes, too. The Ninth Circuit perhaps missed the mark in this part of its opinion because the settling defendants were willing to waive their right to challenge reliance on an individual basis. If so, the settling parties should be able to explain that on remand, too, without in any way undermining this important defense to disputed certification of any *litigation* class.

Somewhat gratuitously, the Ninth Circuit majority also questioned the $9 million fee that the district court awarded to plaintiffs' counsel. The Court reminded district judges of the need to compare a proposed fee to the value obtained for the class, and counseled against knee-jerk application of lodestar multipliers. Critically, however, all the Court said in this regard is that if a lodestar-based fee seems off-kilter relative to the value obtained, district courts should take "a second look to evaluate the reasonableness of the hours worked and rates claimed." The panel majority chastised the district judge for not having made specific findings as to the settlement's value, the reasonableness of plaintiffs' counsel's hours, or the justification of a lodestar multiplier. But, here again, the district court is free to reach the same conclusions on remand with just a few more steps.

The main lesson of *Hyundai*, good in any Circuit, is not to take shortcuts during the settlement approval process. That is especially true in large cases where objections are likely. Both sides in the case have roles to play in ensuring that district courts have all the tools necessary to reach an approval decision that will stand up on appeal. It is a shame that able counsel on both sides of *Hyundai*, as well as a highly respected district judge, now have to undertake a do-over. However, although the Ninth Circuit's decision certainly can be described as persnickety, it did not tell the class action bar anything we did not, at some level, already know.