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Did the 9th Circuit just hobble nationwide class action settlements?

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(Reuters) - To understand the importance of a new opinion from the 9th U.S. Circuit Court of Appeals in a class action accusing Hyundai and Kia of deceiving car owners about the fuel efficiency of some of the cars, you have to read the impassioned dissent by Judge Jacqueline Nguyen. If she's right, her colleagues in the majority in In re Hyundai and Kia Fuel Economy Litigation have made it much, much harder to reach nationwide class action settlements.

The majority, Judges Andrew Kleinfeld and Sandra Ikuta, vacated U.S. District Judge George Wu's final approval of a settlement that plaintiffs' lawyers valued at $210 million. Judge Ikuta cast doubt on that valuation, pointing out that class members filed claims totaling only $44 million – and that many of the car owners who participated in the class action were already enrolled in a reimbursement program the carmakers offered before the case settled.

The majority said that if Judge Wu, on remand, certifies a new class, he should recalculate appropriate legal fees using a percentage-of-the-recovery cross-check on the lodestar calculation he used to award plaintiffs' lawyers $9 million. Judge Ikuta's opinion also knocked used car buyers out of any class Judge Wu may certify on remand.

But the crux of the opinion – and the main point of Judge Nguyen's dissent – is the majority's big reason for undoing the settlement: Judge Wu's failure to evaluate the consumer laws of states other than California to determine whether California law can cover out-of-state class members.

"The district court was required to apply California's choice of law rules to determine whether California law could apply to all plaintiffs in the nationwide class, or whether the court had to apply the law of each state, and if so, whether variations in state law defeated predominance," Judge Ikuta wrote.

Judge Wu committed a legal error when he did not acknowledge arguments by one of the five objectors to the final settlement that Virginia consumer law is materially different than California law, and he compounded the error when he omitted a final determination of whether differences in state consumer laws prohibit a nationwide class under Rule 23's predominance requirement.

The majority relied heavily on the U.S. Supreme Court's 1997 Amchem v. Windsor (521 U.S. 591) - which highlighted the predominance requirement in striking down a sweeping asbestos class action settlement – but even more heavily on 9th Circuit precedent in 2012's Mazza v. American Honda Motors (666 F.3d 581). In the Mazza case, Honda challenged certification of a class of car buyers by offering evidence that consumer laws in the 44 states in which it sold the cars at issue were materially different. The Mazza court determined that each state has an interest in applying its own laws to car purchases in its jurisdiction, and those interests would be impaired if California law were applied to all class members.

Mazza did not expressly address the predominance question, Judge Ikuta wrote, but "its vacatur of the district court's class certification order established that plaintiffs had failed to show that common questions would predominate over individual issues." Mazza, according to Judges Ikuta and Kleinfeld, pretty much spelled doom for the Kia and Hyundai nationwide settlement.

Judge Wu had reasoned that because he certified a nationwide class in the context of a proposed settlement – and not, as in Mazza, a contested class certification proceeding – he did not have to undertake a choice-of-law analysis. The majority said that was a mistake. Moreover, it said, proponents of the nationwide class action bore the burden of establishing the California law could apply to all class members.

That's where Judge Nguyen said the majority made a grievous mistake, splitting with other circuits and dealing "a major blow to multistate class actions," she said in her dissent. "This newly invented standard significantly burdens our overloaded district courts, creates a circuit split, and runs afoul of the doctrine established long ago in Erie R.R. v. Tompkins, 304 U.S. 64 (1938)."

The big issue, she wrote, is burden-shifting. "The majority's first misstep in the predominance analysis is a subtle, but dispositive, departure from our nationwide class action jurisprudence," Judge Nguyen said. "In violation of controlling choice-of-law rules, the majority places the burden on the district court or class counsel to extensively canvass every state's laws and determine that none other than California's apply."

In fact, Judge Nguyen said, the burden of showing material differences between California law and the law of other states lay with the objectors, who failed to meet it, and not with the court or with proponents of the nationwide settlement. In Mazza, she said, Honda provided choice-of-law analysis in opposing class certification. Here, no one (except for an objector from Virginia) offered such evidence. "We have never held, in Mazza or any other case, that a class cannot be certified unless a district court sua sponte raises and refutes arguments on the objectors' behalf in support of foreign law," she wrote. "Rather, we have made clear that, if the 'parties do not address choice-of-law issues, California courts presumptively apply California law.'"

Judge Nguyen said other circuits have said the same thing. She quoted, for example, a 2001 opinion by Judge Frank Easterbrook of the 7th Circuit in In re Mex. Money Transfer Litig., 267 F.3d 743: "It is best to bypass marginal theories if their presence would spoil the use of an aggregation device that on the whole is favorable to holders of small claims. Instead of requiring the plaintiffs to conduct what may be a snipe hunt, district judges should do what the court did here: Invite objectors to identify an available state-law theory that the representatives should have raised, and that if presented would have either increased the recovery or demonstrated the inappropriateness of class treatment."

I have a feeling we haven't heard the last of this case, which the majority remanded to Judge Wu for reconsideration of class certification. As I said above, if Judge Nguyen is right about the majority creating big new barriers for nationwide class action settlements, the class action bar on both sides of the v. is not going to be happy.

(Reporting by Alison Frankel)

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