



## Business Litigation Update

January 2018

### Ninth Circuit Enforces “Heightened” Standard for Certification of Settlement Classes

#### Key Notes:

- This decision could signal increased scrutiny of settlement classes in the Ninth Circuit, and could reduce its attractiveness to plaintiffs.
- Certification of a settlement class is subject to heightened “rigorous analysis” and is a question separate from settlement fairness.
- Defendants should develop their strategies with careful attention to the long-term consequences of their decisions.

Class actions present defendants with unique challenges, some of which surround the desirability and practicability of settling. On January 23, 2018, by a 2-1 vote, a panel of the United States Court of Appeals for the Ninth Circuit vacated an order of a California district court certifying a nationwide class and approving a class-wide settlement, remanding for further consideration and sparking debate about the future of class settlements. *See Espinoza v. Ahearn (In re Hyundai & Kia Fuel Econ. Litig.)*, 2018 U.S. App. LEXIS 1626 (9th Cir. January 23, 2018). The decision is notable in part because the appellate panel principally took issue with certification of the class rather than the substance of the proposed settlement, finding that the district court improperly treated the settlement as relieving it of the duty to perform a rigorous analysis of whether the requirements for certification were satisfied.

#### District Court Proceedings

The plaintiffs in *Ahearn* sued Hyundai and Kia under state common law and statutory consumer theories on behalf of a proposed nationwide class, alleging false advertising of

the fuel efficiency of certain car models. In particular, they alleged that the defendants had submitted improper fuel efficiency data to obtain EPA efficiency certificates. Over the course of proceedings, a number of other putative class actions were also filed and later transferred to the Northern District of California by the Judicial Panel on Multidistrict Litigation.

Plaintiffs in several of the cases moved to certify a nationwide class, and the defendants opposed class certification on grounds including variations in state laws that would apply to a nationwide class. Unusually, a group of plaintiffs in a case transferred from Virginia also opposed class certification on similar grounds and later objected to the settlements. After initial rounds of briefing and argument, the district court indicated to the parties that it would probably rule that the proposed nationwide class would not meet the requirements of Rule 23 for certification, but that it might consider a class limited to California. Before the court reached a final decision, however, the plaintiffs and both Hyundai and Kia announced that they had negotiated nationwide class settlements. The district court certified the classes and approved the settlements, but absent class members filed objections, which ultimately made their way to the Ninth Circuit.

#### Ninth Circuit Reversal

Finding that the district court had abused its discretion, and vacating class certification, the Ninth Circuit identified several foundational errors by the district court. Ninth Circuit precedent required the court to perform choice-of-law analysis and determine whether differences in state law

defeated predominance, but the district court had incorrectly determined that it was not required to perform that analysis for purposes of a settlement class. This was a legal error. *Espinoza*, 2018 U.S. App. LEXIS 1626, \*33-37. In addition, even if the class had been limited to California, the district court should have limited it to owners who relied upon the challenged representations. (Note, however, that this would result in a “fail-safe” class, one defined by individual merits determinations and thus not a proper class.) The district court instead presumed class-wide reliance, but the record did not support such a presumption, even under California law. *Id.* \*37-42.

The Ninth Circuit found that the district court’s ruling ran afoul of two related principles.

First, quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), the court held that the prerequisites for class certification require “[h]eightedened” attention in the context of settlement, because, when a case is settled, the court will not have an opportunity to revisit or adjust its certification order as the case unfolds. *Espinoza*, 2018 U.S. App. LEXIS 1626, \*14. The panel majority went on to say, “a district court’s obligation to conduct a ‘rigorous analysis’ to ensure that the prerequisites of Rule 23 have been met ... is heightened” in the settlement context. *Id.* \*42. The exception is that manageability of trial need not be shown, since there will be no trial following settlement.

Second, a court may not certify the class on the ground that it finds the proposed settlement fair. *Id.* \*15. Class certification and settlement review are separate analyses that should not be conflated. The district court’s reasoning that settlement relieved it of the need to perform the choice-of-law and predominance analyses was “wrong as a matter of law.” *Id.* \*35.

The parties in *Espinoza* are likely to seek *en banc* review, but their prospects are questionable, because the principles on which the panel majority relied were not novel ones, notwithstanding the attention the decision has drawn due to its unusual result. They are not without hope, however, because the Ninth Circuit generally is friendly to class actions.

### Key Takeaways

Although the panel majority applied standards that are established in existing precedent, the decision and analysis could signal greater future scrutiny of class settlements and greater difficulty obtaining approval and defending them against objectors.

To approve a class settlement, a court must first find that certification of the class is proper, after performing the required “rigorous analysis.” Settlement does not relieve Rule 23 requirements other than manageability through trial. This analysis is not lessened in the settlement context. Parties who propose to settle must attend carefully to these requirements.

The decision illustrates the challenging strategic decisions defendants often face. The defendants effectively opposed class certification on grounds defendants have successfully used many times before, and the trial court tentatively agreed with them. After the settlement agreements were reached, however, objectors successfully attacked the settlements on appeal on the same grounds – that variations in state law would defeat predominance. There are no easy answers to dilemmas of this type. Defendants can only plan carefully, recognizing that their decisions today may affect their options available later.

The decision could also make California less attractive as a venue of choice for plaintiffs to file nationwide class actions, as plaintiffs’ counsel weigh their prospects for achieving a settlement in different jurisdictions.

### FOR MORE INFORMATION

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