Sometimes, the strict rules governing certification of a class action under Federal Rule of Civil Procedure 23 can actually hinder settlement of a class, even if the parties agree that this is the best result. Yesterday, the Ninth Circuit issued an en banc decision in *In re Hyundai and Kia Fuel Economy Litigation* that makes it a little easier to resolve nationwide class actions, and clarifies that the standards for certification are different (more relaxed) in the settlement context.

As we reported here earlier, a panel of the Ninth Circuit previously vacated a district court’s approval of a nationwide class action settlement because the district court failed to address choice-of-law issues and variations in relevant state laws, and also improperly “presumed” reliance on allegedly “misleading advertising.” The case demonstrates the significant obstacles to certifying a nationwide class. That decision was written by Judge Jacqueline H. Nguyen with a dissent by Judge Sandra S. Ikuta. Yesterday, their roles were reversed.

Judge Nguyen wrote a majority panel opinion for the court sitting en banc that upheld the nationwide settlement, and made clear that the standards for certifying a
class action are different when a case is being litigated and when it is being settled.

As the court explained (citations omitted), the factors relevant to predominance under Rule 23 “must be considered in light of the reason for which certification is sought—litigation or settlement—which ‘is relevant to a class certification.’” “[I]n deciding whether to certify a settlement-only class, ‘a district court need not inquire whether the case, if tried, would present intractable management problems.’” Slip op. at 35.

In short, some classes can be certified for settlement purposes, even if they could not be certified for litigation. Thus, the Ninth Circuit’s new decision tamps down some of the fears that were raised after issuance of the panel decision about the inability to settle nationwide classes.

Notably, counsel for plaintiffs in many litigated class actions will cite as support for certification court orders that certify a class for settlement purposes only. Yesterday’s decision also makes plain the limited persuasive value of such orders when the proposed class is being certified for ongoing litigation (as opposed to settlement).

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