HUNTON& WILLIAMS

Client Alert

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Raising the Bar on Class Action Certifications in California

Two recent decisions out of California—one in state court and one in federal—provide defendants new ammunition for defeating class certification. The Ninth Circuit's decision in *In re Hyundai & Kia Fuel Economy Litigation* and the Fourth District Court of Appeal's decision in *Apple Inc. v. Superior Court* have important implications for California retailers opposing class certification. But *Hyundai* also poses challenges to retailers looking to settle class claims on a nationwide basis.

***In re Hyundai & Kia Fuel Econ. Litig*., 15-56014, 2018 WL 505343 (9th Cir. Jan. 23, 2018)**

On January 23, 2018, the Court of Appeals for the Ninth Circuit in *Hyundai* vacated and remanded a district court order certifying a nationwide settlement class of car owners who sued defendants Hyundai Motors and its Kia affiliate over alleged misrepresentations regarding vehicle fuel efficiency. In a 2-1 decision, the Ninth Circuit held that the district court abused its discretion by failing to analyze whether common questions of law and fact predominated under Rule 23(b)(3) with regard to the settlement class. Specifically, the Ninth Circuit found that the district court failed to analyze potential differences in state consumer protection laws and whether class members who purchased used cars were exposed to (and therefore could have relied on) the defendants' allegedly misleading statements. These failures, according to the Ninth Circuit, amounted to an abuse of discretion.

The Ninth Circuit's opinion relied heavily on its prior opinion in *Mazza v. American Honda Motor Co*., 666 F.3d 581 (9th Cir. 2012), which decertified a nationwide class based on differences in various state consumer laws. The *Mazza* court held that a nationwide class could not be certified for litigation purposes, reasoning that each of the 44 states involved had "a strong interest in applying its own consumer protection laws." Notwithstanding, the Ninth Circuit stated that its reversal of the settlement class in *Hyundai* "does not mean that the court is foreclosed from certifying a class (or subclasses) on remand," adding, "[w]e make no ruling on this issue, and merely note that *Mazza* determined that no such class was possible in a closely analogous case."

***Apple Inc. v. Superior Court,* D072287, 2018 WL 579858 (Cal. Ct. App. Jan. 29, 2018)**

The following week, on January 29, 2018, the Fourth District Court of Appeal in *Apple* decertified a class of consumers who sued Apple, Inc., over allegedly defective iPhone power buttons. In doing so, the Fourth District Court of Appeals held that the trial court had to consider whether plaintiffs' expert evidence about class damages calculations withstood *Sargon* scrutiny (an evidentiary standard akin to the *Daubert* standard in federal courts) at the certification stage. In *Apple*, plaintiffs filed a motion to certify two classes, one for iPhone 4 and 4S purchasers and one for iPhone 5 purchasers. The proposed classes consisted of California citizens who had purchased the iPhones and whose iPhone power button stopped working or worked intermittently during the phone's warranty period. In support of their motion for certification, plaintiffs relied on expert testimony, which, among other things, sought to establish that "damages and equitable remedies could be calculated on a classwide basis." In response, Apple argued that the trial court should consider the admissibility of plaintiffs' expert evidence under *Sargon*. The trial court held *Sargon* was inapplicable at the certification stage. On appeal, the Fourth District Court of Appeal reversed, noting that "[a]lthough class certification is merely a procedural device, and not a determination on the merits, it has profound consequences for the trial court's management of the

litigation and the rights of the parties." The Fourth District Court of Appeals then vacated certification and instructed the trial court to reconsider the expert evidence under *Sargon*.

What This Means For Retailers

The Ninth Circuit's decision in *Hyundai* may both hurt and help retailers in class actions for different reasons. On one hand, the decision complicates a retailer's ability to settle on a nationwide basis. In the Ninth Circuit, at least, the argument used to fight certification during litigation—that state law variations will predominate over common questions—could preclude certification of a nationwide settlement class. That might prove especially true where the retailer itself has raised the variation of state laws in opposition to a motion to certify before deciding to settle on a classwide basis. On the other hand, the *Hyundai* decision could mean that plaintiffs in the Ninth Circuit will bring fewer nationwide class action claims alleging violations of state consumer laws. Plaintiffs' counsel already recognize the difficulty with obtaining a contested certification of such claims; now they will recognize that they may not even be able to settle them.

The *Apple* decision likely benefits retailers by aligning the practice in California state courts with the practice of the majority of federal courts to address the issue: expert testimony must be admissible to serve as support for a class certification motion. Under *Sargon*, trial courts must exclude expert testimony that is unreliable, speculative, or without sufficient foundation. By requiring the application of *Sargon* at the class certification stage, *Apple* arms retailers with another argument to combat class certification.

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