# Ninth Circuit Decertifies Consumer Fraud Class

January 17, 2012 by Sean Wajert

The Ninth Circuit last week reversed the certification of a nationwide class raising consumer fraud claims against an auto maker. See Mazza, et al. v. American Honda Motor Co., No. 09-55376 (9th Circuit).

Honda appealed the district court's decision to certify a nationwide class of all consumers who purchased or leased Acura RL's equipped with a Collision Mitigation Braking System ("CMBS"). The plaintiffs alleged that certain advertisements misrepresented the characteristics of the CMBS and supposedly omitted material information on its limitations. The complaint stated four claims under California Law, specifically the California Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200 et seq., False Advertising Law (FAL), Cal. Bus. & Prof. Code § 17500 et seq., the Consumer Legal Remedies Act (CLRA), Cal. Civil Code § 1750 et seq., and a claim for unjust enrichment. Readers know those are the typical claims in a consumer fraud case in the popular forum of California.

The Ninth Circuit held that the district court erred because it erroneously concluded that California law could be applied to the entire nationwide class, and because it erroneously concluded that all consumers who purchased or leased the relevant Acura RL can be presumed to have relied on defendant's advertisements, which allegedly were misleading and omitted material information.

In 2007, plaintiffs bought Acura RL's from authorized Acura dealerships, and the vehicles were equipped with the CMB System. In December 2007, they filed a class action complaint alleging that Honda misrepresented and concealed material information in connection with the marketing and sale of Acura RL vehicles equipped with the CMBS. According to Plaintiffs, Honda did not warn consumers (1) that its CMB collision avoidance system's three separate stages may "overlap," (2) that the system may not warn drivers in time to avoid an accident, and (3) that it allegedly shuts off in bad weather.

The district court certified a nationwide class of people in the United States who, between August 17, 2005 and the date of class certification, purchased or leased new or used Acura RL vehicles equipped with the CMBS. The district court concluded that California law could be applied to all class members because Honda did not show how the differences in the laws of the various states were material, how other states might have an interest in applying their laws in this case, and how these interests were implicated in this litigation. It also held that class members were entitled to an inference of reliance under California law.

Before certifying a class, the trial court must conduct a rigorous analysis to determine whether the party seeking certification has met the prerequisites of Rule 23. The party seeking class certification has the burden of affirmatively demonstrating that the class meets the requirements of Federal Rule of Civil Procedure 23. And, under Rule 23(b)(3), a plaintiff must demonstrate the superiority of maintaining a class action and show that the questions of law or fact common to class members predominate over any questions affecting only individual members. Here, Honda contended that common issues of law did not predominate because California's consumer protection statutes may not be applied to a nationwide class with members in 44 jurisdictions. It further contended that common issues of fact did not predominate because the court impermissibly relied on presumptions that all class members were exposed to the allegedly misleading advertising, that they relied on misleading information in making their purchasing decision, and that they were damaged as a result.

First, choice of law. Under California's choice of law rules, the class action proponent bears the initial burden to show that California has significant contact to the claims of each class member. Also, California law may only be used on a class-wide basis if the interests of other states are not found to outweigh California's interest in having its law applied. Honda argued that the district court misapplied the three-step governmental interest test. The Ninth Circuit agreed. The district court abused its discretion in certifying a class under California law that contained class members who purchased or leased their car in different jurisdictions with materially different

consumer protection laws. For example, some state consumer fraud laws have no scienter requirement, whereas many other states' consumer protection statutes do require scienter. See, e.g., Colo. Rev. Stat. 6-1-105(1)(e), (g), (u) (knowingly); N.J. Stat. Ann. § 56:8-2 (knowledge and intent for omissions); Debbs v. Chrysler Corp., 810 A.2d 137, 155 (Pa. Super. 2002) (knowledge or reckless disregard). Some states require named class plaintiffs to demonstrate reliance, while some other states' consumer protection statutes do not. These differences are "not trivial or wholly immaterial."

The court of appeals reminds us that consumer protection laws are a creature of the state in which they are fashioned. They may impose or not impose liability depending on policy choices made by state legislatures. Each state has an interest in setting the appropriate level of liability for companies conducting business within its territory. Maximizing consumer *and* business welfare, and achieving the correct balance for society, does not inexorably favor greater consumer protection; instead, setting a baseline of corporate liability for consumer harm requires balancing these competing interests. Getting the optimal balance between protecting consumers and attracting foreign businesses, with resulting increase in commerce and jobs, is not so much a policy decision committed to a federal appellate court, or to particular district courts where a plaintiff may sue, as it is a decision properly to be made by the legislatures and courts of each state. More expansive consumer protection measures may mean more or greater commercial liability, which in turn may result in higher prices for consumers or a decrease in product availability. Here, the district court did not adequately recognize that each foreign state has an interest in applying its law to transactions within its borders and that, if California law were applied to the entire class, foreign states would be impaired in their ability to calibrate liability to foster commerce.

The court of appeals also found that the district court abused its discretion in finding that common issues of fact predominated, because the scale of the advertising campaign here did not support a presumption of reliance, even if one were legally available. It was likely that many class members were never exposed to the allegedly misleading advertisements, insofar as advertising of the challenged system was very limited. And it was not dispositive that Honda's advertisements were allegedly misleading because of the information they omitted, rather than the information they claimed. For everyone in the class to have been exposed to the omissions, it was necessary for everyone in the class to have viewed the allegedly misleading advertising. Here the limited scope of that advertising makes it unreasonable to assume that all class members viewed it. Honda's product brochures and TV commercials fell short of the extensive and long-term fraudulent advertising campaign that might support a presumption in the eyes of some courts. Even if Honda allegedly might have been more elaborate and diligent in disclosing the limitations of the CMB system, its advertising materials did not deny that limitations exist. A presumption of reliance does not arise when class members were exposed to quite disparate information from various representatives of the defendant. California courts have not allowed a consumer who was never exposed to an alleged false or misleading advertising campaign to recover damages under California's UCL.