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The Ninth Circuit Applies the Brakes to Runaway Nationwide Class Actions

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In the recently published decision Mazza v. American Honda Motor Company, Inc., No. 09-55376 (9th Cir. 1-12-12), the Ninth Circuit reversed the certification of a nationwide class composed of consumers seeking relief under California's consumer protection laws. In doing so, the court significantly decreased the viability of such nationwide classes, particularly when the plaintiff seeks to recover under any particular state's consumer protection statutes.

In Mazza, the plaintiff sought to represent a class composed of certain purchasers of the Acura RL automobile. On the Acura RL, an available option was the Collision Mitigation Braking System ("CMBS"), costing roughly $4,000. According to Honda, the CMBS involved a three-step process whereby sensors in the car would trigger alarms and apply increasing brake pressure to alert drivers to possible accidents and, then, reduce injuries if the accident could not be avoided. Mazza, at pp. 190-191. Honda advertised the CMBS in brochures, television commercials (two commercials, each running for a week nationwide), and videos available to customers at Acura dealerships. Id. at 191-192.

The plaintiffs filed suit claiming that Honda failed to warn consumers that (1) the CMBS's three steps may overlap, (2) the system may not warn drivers with enough time to avoid the accident, and (3) that the CMBS shuts off in bad weather. Id. at 193. Seeking to represent CMBS purchasers from California and 43 other states, the plaintiffs sought recovery under California's Unfair Competition Law ("UCL"), the False Advertising Law, and the Consumer Legal Remedies Act ("CLRA").

The district court certified a nationwide class under Federal Rule of Civil Procedure 23(b)(3), finding that common questions of law and fact predominate. Id. at 194. The court concluded that California law would apply to purchasers in other states and that class-wide reliance on Honda's advertisements could be presumed under the recent California Supreme Court decision, In re Tobacco II Cases, 46 Cal. 4th 298 (2009). Honda appealed the certification order.

The Ninth Circuit reversed. The court first addressed the "choice of law" issue, setting forth the three-part test for choice of law in nationwide class actions: (1) the court must determine if the laws of two jurisdictions are different, (2) if there is a difference, the court must consider each jurisdiction's interest in applying its laws, and (3) if there is a conflict in the interests, the court must consider each jurisdiction's policy and apply the law "of the state whose interest would be more impaired if its law were not applied to members of the proposed class." Mazza, at 198-199, *citing* McCann v. Foster Wheeler, 48 Cal. 4th 68, 81-82 (2010).

The Ninth Circuit held that California law does not apply to a nationwide class. First, the court recognized the significant differences between consumer protection laws in numerous states. For example, California's CLRA does not have a scienter requirement, while states like Colorado and New Jersey require a knowingly false advertisement or omission. Mazza, at 200. Additionally, California's remedies under the CLRA and UCL are more limited than other states' consumer protection laws, which may allow treble damages or attorneys' fees. Id. at 201.

Second, the Ninth Circuit held that other states had a strong interest in having their laws applied to the facts of this case. The Ninth Circuit described the "balance" between protecting consumers and encouraging economic growth. Since each state may achieve balance differently, every state has an interest in having its laws (rather than California's laws) apply to the consumers who purchased Acura RLs within their state. Id. at 203.

Third, the Ninth Circuit held that, because each state has an interest in seeing its own laws applied, "if California law were applied to the entire class, foreign states would be impaired in their ability to calibrate liability to foster commerce." Id. at 204. Since California's interest in applying the UCL and CLRA to transactions occurring in other states is minimal, the district court erred in concluding that California's consumer protection laws should apply to those class members who purchased Acura RLs with the CMBS in the 43 states other than California. Id. at 205. Accordingly, there were no "common questions of law," and certification was improper.

Separate and apart from the erroneous choice of law analysis, the Ninth Circuit also held that certification was improper because class-wide reliance could not be presumed. The court noted that, as set forth in Tobacco II, class-wide reliance on the allegedly false advertisement may be presumed in some situations, thereby creating common questions of law and fact suitable for class-wide determination. In this case, however, no such presumption was possible: Unlike the ever-present cigarette advertisements in Tobacco II, Honda had limited advertisements for the CMBS. Mazza, p. 209. Thus, whether a class member was entitled to recovery was completely determinative upon whether that class member saw the limited advertisements and relied on those advertisements in buying the CMBS. Id. Given the class definition (everyone who purchased or leased an Acura RL with CMBS), the class was overbroad because individuals

who never saw the advertisements would not be eligible for recovery. Since whether each class member relied on the advertisements was a necessary question of fact, common issues of fact did not predominate and class certification was improper. Id.

Mazza represents a significant victory for defendants facing alleged nationwide consumer class actions. The choice of law analysis by the Ninth Circuit essentially establishes a policy against nationwide class actions: Since California's UCL and CLRA statutes are so different from other states' consumer protection laws, and every state is entitled to strike a balance between consumer protection and commerce, it is difficult to imagine how any nationwide class could be certified when potential class members purchased the product in other jurisdictions. The analysis in Mazza is not case-specific, as the Ninth Circuit relied on high-level economic policy analysis to conclude that it was improper to apply the UCL and CLRA to the nationwide class. This choice of law argument could be asserted by any defendant faced with allegations of a nationwide class action. As if to emphasize the results of Mazza, Judge Nelson, who dissented from the decision, concluded that "The majority's holding will prove devastating to consumers" who will be unable to assert nationwide class actions when the potential recovery from individual actions is so small. Id. at 213-214.

Mazza also signals a further retreat from the class-wide reliance espoused in Tobacco II. The limited nature of the advertisements for the CMBS stood in stark contrast to the prevalent advertisements addressed in Tobacco II. Here, class-wide reliance was wholly improper even *though* there were nationwide commercials and numerous opportunities for all class members to view the literature and commercials when purchasing their cars. Thus, defendants trying to defeat class certification should analogize to Honda's limited advertisements and defeat the assumption that common questions of reliance will predominate.