by Elliot J. Siegel and Julian Burns King

Pondering Predominance

Clarity regarding the consequences of different state law for predominance analysis is anticipated in the Ninth Circuit en banc panel finding

In re Hyundai and Kia Fuel Economy Litigation has the potential to create significant barriers to certification of nationwide settlement classes in the Ninth Circuit.[1] While the decision currently is under consideration by an en banc panel of the Ninth Circuit Court of Appeal, if the full court adopts the panel's reasoning, objectors can use variations in state law to defeat predominance for a settlement class—potentially resulting in a sea change in how class settlements are currently approved. Until the issue is settled, lawyers should consider thoroughly engaging in choice-of-law analysis when seeking to certify a class.

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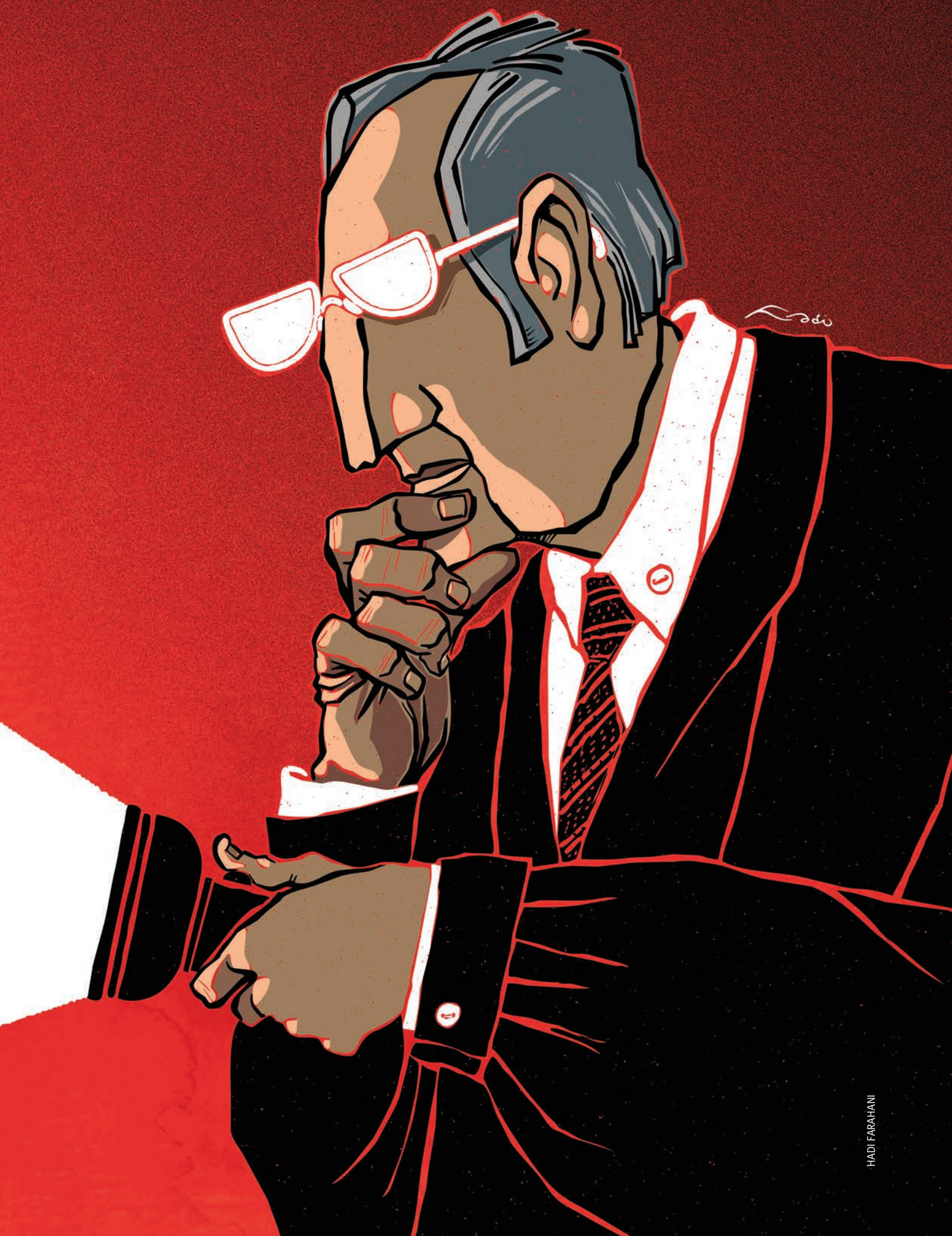

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Under Rule 23(a) of the Federal Rules of Civil Procedure, four prerequisites must be satisfied before certification of a putative class: 1) numerosity, 2) commonality, 3) typicality, and 4) adequacy. To satisfy Rule 23(a), a plaintiff must prove through a "rigorous analysis" that each particular requirement is met.[2]

Once Rule 23(a) is satisfied, a party must then show either 1) a risk that separate actions would create a risk of prejudice, 2) that injunctive or declaratory relief is appropriate to the class as a whole, or 3) that common questions of law and fact predominate through the class and class adjudication is superior to any other methods of trying the case.[3]

Until the Ninth Circuit panel's opinion in *Hyundai*, the primary case governing application of the predominance requirement to a nationwide settlement class was *Hanlon v. Chrysler Corporation*.[4] Similarly to *Hyundai*, in *Hanlon*, dozens of class actions, asserting violations of state consumer protection laws, were consolidated through multidistrict ligation (MDL) in which the parties reached a settlement proposing a nationwide settlement class seeking damages under state consumer protection statutes for defective latches in their vehicles. Despite variations in state consumer protection laws, the Ninth Circuit found that common issues predominated because "a common nucleus of facts and potential legal remedies," including defendant's awareness of the latch defects, dominated each of the state law claims at issue in the litigation.[5] Potential differences in remedies and variations in state law did not defeat predominance, and the proposed nationwide class was certified for settlement purposes.[6]

Hyundai in the District Court

In 2011, a consumer advocacy group complained to the Environmental Protection Agency (EPA) that Hyundai and Kia had overstated the fuel efficiency of certain vehicles in "Monroney stickers," the disclosures in the window of every new car that provide official vehicle specifications.[7] The EPA launched an investigation and, in late November 2012, confirmed that Hyundai and Kia had used improper procedures to develop the fuel economy information advertised for certain 2011, 2012, and 2013 model year vehicles, resulting in inflated fuel efficiency estimates. At the same time that the EPA announced the results of its investigation, both companies "voluntarily" announced that they would lower the affected vehicles' fuel economy ratings and implement a lifetime reimbursement program to reimburse customers for fuel costs based on the difference between the affected vehicles' actual and advertised fuel economy ratings.[8]

While the EPA investigation was pending, numerous plaintiffs filed lawsuits alleging false advertising and unfair competition claims against Hyundai and Kia, based on alleged misstatements in the Monroney stickers and other advertising.[9] One of these cases, *Espinosa v. Hyundai Motors America*, alleged claims under California's unfair competition law,[10] false advertising law,[11] and the Consumer Legal Remedies Act (CLRA),[12] and sought remedies of damages, rescission, restitution, and injunctive relief in the form of corrective advertising.[13] Following removal to federal court, plaintiffs moved to certify a nationwide class consisting of owners of specified vehicles who purchased or leased vehicles in the United States.[14] Hyundai argued that variations in state consumer protection laws precluded application of California law to non-Californian consumers, attaching a 34-page chart of purportedly relevant variations between California law and the law of other states.[15] Hyundai claimed that these variations defeated Rule 23(b)(3)'s predominance requirement.[16]

Shortly thereafter, *Espinosa* was consolidated with dozens of other cases in an MDL. The parties reached a voluntary settlement with a nationwide class comprised of all purchasers of certain vehicle makes and model years. In December 2013, plaintiffs moved for class certification and preliminary approval of the nationwide settlement. The district court granted the motion for preliminary approval and certified the nationwide class—acknowledging but ultimately dismissing concerns about differences in substantive state law.[17] In June 2015, the district court entered final approval of a $210 million settlement agreement without engaging in a state-by-state choice of law analysis.[18]

Order Vacating Settlement Class

After approval of the final settlement, objectors filed appeals arguing that the approved settlement was not "fair and adequate," partially on the basis that the district abused its discretion for failing to undertake a choice of law analysis on the consumer protection claims brought on behalf of the nationwide class.[19] The Ninth Circuit panel agreed, vacating the certification order after finding the failure to undergo any choice-of-law analysis for the settlement class was legal error.

In reaching this conclusion, the panel relied on the Ninth Circuit's 2012 decision in *Mazza v. American Honda Motor Company*, which held that in order to apply California law to a nationwide class, it must first be shown that sufficient contacts exist between California and class members' claims for constitutional application of California law.[20] If that is the case, then a three-part governmental interest test is applied asking: 1) if the law of the foreign jurisdictions is similar or different to California law, 2) whether the jurisdiction has an interest in applying its own law over California's, and 3) which state's interest in applying its laws would be more impaired if subordinated.[21] If there is a true conflict, the state with the "larger" degree of impairment must have its law applied. Thus, under *Mazza*, in determining whether Rule 23(b)(3) is satisfied, common questions of law and fact do not "predominate," justifying use of class-wide adjudication, unless the government interest test comes out in favor of uniformly applying California law to the class.

This distinction between a litigation and settlement class impermissibly tainted the settlement negotiations because "class counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer, and the court faced a bargain proffered for its approval without benefit of adversarial investigation."[22] The panel also found it significant that the district court early on had found "material differences" between the California and foreign state laws and that a choice-of-law analysis militated against nationwide certification in accordance with *Mazza*, but approved settlement regardless because the court was not certifying a litigation class.[23] Further, the panel did not believe, as the district court did, that reliance on a fairness hearing would allow the court to ameliorate the choice of law problem.[24] Given that a court's Rule 23 obligations are "heightened" in the context of settlement certification, the panel found that the district court's obligation to conduct a "rigorous analysis" of compliance with Rule 23(b) was heightened as well. The panel expressly repudiated the proposition that settlement class certification was subject to a lesser standard than litigation class certification.[25]

Judge Nguyen's Dissent

In a strongly worded dissent, Judge Jacqueline Hong-Ngoc Nguyen rejected the majority's opinion, which she viewed as dealing "a major blow to multistate class actions."[26] In her view, the district court validly exercised its discretion in certifying

a settlement class. Observing that "[b]oth [the Ninth Circuit] and our sister circuits have long held that a nationwide class action cannot be decertified simply because there are differences between state consumer protection laws," Judge Nguyen reiterated that the predominance inquiry "is not a matter of nose-counting…more important questions apt to drive the resolution of the litigation are given more weight in the predominance analysis over individualized questions which are of considerably less significance to the claims of the class."[27] The district court's finding that the undisputed common questions—whether fuel economy statements were, in fact, accurate and whether defendants knew their statements were false or misleading—established predominance was a proper application of Ninth Circuit law that was entitled to deference by the appellate court.[28]

More importantly, Judge Nguyen argued that the majority had created an onerous new burden for district courts and class counsel in putative nationwide class actions: the duty to survey state law and affirmatively prove that the forum state's law applies.[29] Noting that the objectors in *Hyundai* failed to argue choice of law issues at the district court level, she accused the majority of "reassign[ing]… the burden" on choice-of-law issues to the district court and class counsel, violating the basic mandates of Rule 23 and *Erie Railroad Company v. Tompkins*,[30] which requires a federal court sitting in diversity jurisdiction to apply the forum state's choice-of-law rules.[31]

Finally, Judge Nguyen noted, the panel's ruling unnecessarily created a circuit split. In *Sullivan v. DB Investments, Inc.*, the en banc Third Circuit held that variations in state rights and remedies did not defeat a finding of predominance as to a putative nationwide class.[32] The *Sullivan* court noted that concerns regarding differences in state law largely go to the manageability of the class action format, which is not at issue for a settlement (as opposed to litigation) class.[33] Similarly, in *In re Mexico Money Transfer Litigation*, the Seventh Circuit noted that "nationwide classes are certified routinely even though every state" has its own laws.[34] Like the court in *Sullivan*, the *Mexico Money* panel found that, "[g]iven the settlement, no one need draw fine lines among state law theories of relief."[35] Moreover, Judge Frank H. Easterbrook, writing for the panel, expressly rejected the burden-shifting adopted by the panel majority in *Hyundai*, observing, "Why [class counsel] should have an obligation to find some way to defeat class treatment is a mystery."[36]

What Is Next?

On July 27, 2018, a majority of the Ninth Circuit's active judges voted in favor of rehearing en banc, vacating the panel's order.[37] A panel of 11 judges held a hearing on September 27, 2018. No order has been issued.

Numerous amici curiae, including such unlikely bedfellows as the National Consumer Law Center and the American Tort Reform Association, weighed in and uniformly urged the en banc Court to reverse the panel's prior order. From the consumer advocates' perspective, the panel's order functionally would result in fewer remedies for consumers,[38] a concern that also animated Judge Nguyen's dissent when she noted that "[e]conomic reality dictates that…consumer lawsuit[s] proceed as a class action or not at all," and the majority's opinion "effectively ensures that no one will recover anything."[39] Moreover, the panel's order would disrupt what the consumer advocates regard as settled law, upending the scheme endorsed by the Ninth Circuit in *Hanlon* and the Third and Seventh Circuits over thousands of opinions and more than a decade of litigation.[40]

For their part, the Association of Global Automakers and American Tort Reform Association argued that the panel's order made it more onerous and expensive to resolve class action litigation, interposing uncertainty, briefing, and attorneys' fees for counsel in each of the 50 states as additional obstacles to reaching fair and just settlements.[41] This concern echoed the plaintiffs' petition in support of rehearing *en banc*, which argued that the panel's decision "increases the expense and uncertainty of nationwide settlements, which reduces their likelihood, contrary to public policy."[42]

A third set of amici expressed concern for the already overburdened court system.[43] As the Third and Seventh Circuits observed in *Sullivan* and *Mexican Money*, respectively, requiring courts to engage in a substantive comparison between state laws absent any articulated concern by objectors amounts to a wasteful intellectual exercise that unduly burdens the district courts and further slows relief to aggrieved class members. (In seeking en banc review, the *Hyundai* plaintiffs called this exercise "wasteful make-work for litigants and lower courts when a case will not be tried.")[44] These amici accused the panel of conflating manageability—which is irrelevant for purposes of settlement certification—with predominance, which courts consider when certifying a settlement class.[45]

Each of these concerns is valid and weighs in favor of overturning the panel's order and restoring *Hanlon*'s longstanding supremacy. Nevertheless, what are class action litigants to do in the meantime?

Although the Ninth Circuit has vacated the panel's order, the few district courts and Ninth Circuit panels to consider the panel opinion already have developed theories to blunt its impact. In *In re Volkswagen "Clean Diesel" Marketing Sales Practices, and Product Liability Litigation*—where, unlike in *Hyundai*, objectors did raise choice-of-law issues before the district court—a different Ninth Circuit panel found that the settlement was unaffected by the panel's order because, "[u]nlike in that case, the district court here provided a thorough predominance analysis under Rule 23(b)(3), sufficient under *In re Hyundai*."[46] By contrast, the court in *In re Anthem, Inc. Data Breach Litigation* found that a choice-of-law analysis was not required by *Hyundai* because, among other concerns, plaintiffs in the data breach litigation conceded that the laws of the 50 states applied to the settlement while *Hyundai* plaintiffs did not.[47] Moreover, the district court in *Hyundai* previously found that state law variations would defeat predominance in the context of a trial class. It is difficult to see why these distinctions matter; the *Anthem* court's reasoning is best viewed as an attempt to limit the disruptive scope of the panel opinion's order.

As the *Anthem* court observed, the key takeaway from *In re Hyundai*—should the panel's order carry the day—is that courts should examine "differences in the underlying state law as part of the predominance analysis."[48] Presumably, the en banc Ninth Circuit will clarify who, exactly, bears the burden of making this showing. In the meantime, counsel for the settlement class may be best served by providing the district court with the evidence necessary to engage in a predominance analysis and thus earn the deferential standard of review accorded to orders awarding class certification absent errors of law. ■

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[1] In re Hyundai & Kia Fuel Econ. Litig., 881 F. 3d 679, 694 (9th Cir. 2018), *reh'g en banc granted sub nom.* In re Hyundai and Kia Fuel Econ. Litig., 897 F. 3d 1003 (9th Cir. 2018).

[2] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011).

[3] FED. R.CIV. P. 23(b).

[4] Hanlon v. Chrysler Corp., 150 F. 3d 1011 (9th Cir. 1998).

[5] *Id.* at 1020-21.

[6] *Id.* at 1022-23.

[7] In re Hyundai & Kia Fuel Econ. Litig., 881 F. 3d

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679, 694 (9th Cir. 2018), *reh'g en banc granted sub nom*. In re Hyundai and Kia Fuel Econ. Litig., 897 F. 3d 1003 (9th Cir. 2018).
[8] In re Hyundai, 881 F. 3d at 694-95.
[9] Espinosa v. Hyundai Motor Am., No. BC 476445 (Cal. Super. Ct. Jan. 6, 2012).
[10] BUS. & PROF. CODE §§17200–17209.
[11] BUS. & PROF. CODE §17500.
[12] CIVIL CODE §§1750-1784.
[13] In re Hyundai, 881 F. 3d at 695 at n.9.
[14] *Id.* at 695.
[15] *Id.*
[16] *Id.*
[17] *Id.* at 700-01.
[18] *Id.*
[19] *Id.* at 701-02.
[20] Mazza v. Am. Honda Motor Co., 666 F.3d 581 (9th Cir. 2012).
[21] *Id.* at 590.
[22] In re Hyundai, 881 F. 3d at 702-03.
[23] *Id.* at 696.
[24] *Id.*
[25] *Id.*
[26] *Id.* at 708 (Nguyen, J., dissenting).
[27] *Id.* (citing *Hanlon*, 150 F. 3d at 1022-23; Torres v. Mercer Canyons Inc., 835 F. 3d 1125, 1134 (9th Cir. 2016)).
[28] In re Hyundai, 881 F. 3d at 708-09.
[29] *Id.* at 709.
[30] Erie Railroad Company v. Tompkins, 304 U.S. 64 (1938).
[31] In re Hyundai, 881 F. 3d at 709.
[32] Sullivan v. DB Investments, Inc., 667 F. 3d 273, 301-302 (3rd Cir. 2011).
[33] *Id.* at 297.
[34] In re Mexican Money Transfer Litig., 267 F. 3d 743, 747 (7th Cir. 2001).
[35] *Id.* at 746-47.
[36] *Id.* at 747.
[37] In re Hyundai & Kia Fuel Econ. Litig., 897 F. 3d 1003 (9th Cir. 2018).
[38] Brief of Amici Curiae Public Justice, Nat'l Ass'n of Consumer Advocates, Nat'l Consumer Law Ctr., and the Impact Fund in Support of Rehearing (en banc), In re Hyundai and Kia Fuel Economy Litig., No. 15-56014, Dkt. 108 (Mar. 19, 2018) [hereinafter Public Justice Brief] .
[39] In re Hyundai & Kia Fuel Econ. Litig., 881 F. 3d 679, 707, 718 (9th Cir. 2018) (Nguyen, J., dissenting) (internal citations and quotations omitted).
[40] Public Justice Brief, *supra* note 38, at 4.
[41] Brief of Amici Curiae Association of Global Automakers and American Tort Reform Ass'n in Support of Defendant-Appellees' Petition for Rehearing (en banc), In re Hyundai and Kia Fuel Economy Litig., No. 15-56014, Dkt. 106-2 (Mar. 19, 2018).
[42] Plaintiffs' Petition for Rehearing (en banc), In re Hyundai, No. 15-56014, Dkt. 102-1 at p. 2 (Mar. 8, 2018) [hereinafter Plaintiffs' Petition].
[43] Brief of Amici Curiae Hon. Stephen G. Larson (Ret.) and Professor David Rosenberg in Support of Rehearing (en banc), In re Hyundai and Kia Fuel Economy Litig., No. 15-56014, Dkt. 119-2 (Mar. 21, 2018) [hereinafter Larson & Rosenberg Brief].
[44] Plaintiffs' Petition, *supra* note 42, at 7.
[45] Larson & Rosenberg Brief, *supra* note 43, at 6-7.
[46] In re Volkswagen "Clean Diesel" Marketing Sales Practices, and Product Liability Litigation, 895 F.3d 597, 609 (9th Cir. 2018) ("This conclusion is not affected by this court's recent decision in *In re Hyundai & Kia Fuel Economy Litigation*.")
[47] In re Anthem, Inc. Data Breach Litigation, No. 15-MD-02617-LHK, 2018 WL 3872788, at *7 (N.D. Cal. Aug. 15, 2018) (approving settlement after finding that *In re Hyundai* choice of law concerns do not apply).
[48] *Id.*