CLIENT ALERT

Briseno v. ConAgra Foods: Ninth Circuit Eliminates Implied "Ascertainability" Requirement for Class Certification

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The U.S. Court of Appeals for the Ninth Circuit rang in the new year on January 3 by eliminating the ascertainability requirement to certify a class—a decision that likely will prove seminal in consumer class actions in that circuit.

Ascertainability has been commonly understood to be a necessary prerequisite under Federal Rule of Civil Procedure 23, requiring the named plaintiff to offer an administratively feasible, or sufficiently reliable, way to identify members of the class using objective criteria. Many courts have found that ascertainability is an implied prerequisite for certification in addition to the express requirements of Rule 23. In the last several years, however, it has been hotly debated whether any such requirement should be imposed at all.

In *Briseno v. ConAgra Foods*, the Ninth Circuit held that any such "separate administrative feasibility prerequisite" to class certification was "not compatible with the language of Rule 23." The *Briseno* decision states that as long as Ninth Circuit plaintiffs meet Rule 23's express requirements at the certification stage, they need not "proffer a reliable way to identify [class] members." In so holding, the Ninth Circuit followed in the footsteps of the Sixth, Seventh, and Eighth Circuits, while decisively disagreeing with the Third Circuit—further entrenching a circuit split that is now more likely to reach the Supreme Court. But the court left the door open for defendants to oppose certification in cases that pose more serious obstacles to reliably "ascertaining" class members.

The Decision

The *Briseno* appeal centered on a decision by Judge Margaret Morrow of the Central District of California certifying eleven state-wide classes in a consumer class action. The *Briseno* plaintiffs sued ConAgra Foods challenging its use of "100% Natural" on the labels of its Wesson-brand cooking oils. This use of "natural" was false and misleading, they claimed, because each of the oils so labeled was "made from bioengineered ingredients (genetically modified organisms, or GMOs)" that are inherently "unnatural" and artificial.

ConAgra opposed class certification on the ground that "there would be no administratively feasible way to identify members of the proposed classes because consumers would not be able to reliably identify themselves as class members"—for example, by producing receipts or other records confirming they bought Wesson oils.

The district court disagreed. "At the certification stage," it held, "it [is] sufficient that the class [is] defined by an objective criterion: whether class members purchased Wesson oil during the class period." ConAgra immediately appealed.

In its published opinion, the Ninth Circuit agreed with the court below that certification was appropriate, explaining at length that Rule 23 does not require—either expressly or implicitly—that "class proponents must … demonstrate that there is an administratively feasible way to demonstrate who is in the class."

Rather, under the Rule's "plain language," plaintiffs need only "satisfy each of the four requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy—and at least one of the requirements of Rule 23(b)"—explicit criteria that "constitute[d] an exhaustive list." Recognizing, perhaps, that this issue may ultimately reach the highest court, the Ninth Circuit also invoked the Supreme Court's admonition in *Amchem Products v. Windsor* that "courts are not free to amend [Rule 23] outside the process Congress ordered."

The court also justified its ruling on policy grounds. It explained that recognizing a "separate administrative feasibility" requirement would undermine one of the core purposes of the rules relating to class actions: to allow individual plaintiffs to aggregate low-dollar claims that would not otherwise be economical to pursue. "Class actions involving inexpensive consumer goods would likely fail at the outset if administrative feasibility were a freestanding prerequisite to certification"—especially given how few consumers keep records showing that they bought such goods.

The court further found that the "policy concerns that have motivated [other courts] to adopt a separately articulated requirement are already addressed by [Rule 23]." For example, defendants can still exercise their due process rights by raising defenses to the named representatives' claims on the merits, or by contesting absent class members' claims for damages when filed. Similarly, Rule 23(b)(3) ensures that courts take manageability concerns into account by requiring that "a class action [be] superior to other available methods [in light of] the likely difficulties in managing a class action."

The Ninth Circuit warned, though, that courts generally "should not refuse to certify a class merely on the basis of manageability concerns." And the court dismissed out of hand the concern that, "without an administrative feasibility requirement, individuals will submit illegitimate claims and thereby dilute the recovery of legitimate claimants"—especially in class actions involving low-cost consumer goods—asking "[w]hy would a consumer risk perjury charges and spend the time and effort to submit a false claim for a de minimis monetary recovery?"

In sum, *Briseno* makes it considerably tougher for defendants in the Ninth Circuit to oppose certification based on the difficulty of identifying *bona fide* class members.

What Comes Next

In doing away with the requirement altogether, the Ninth Circuit stepped directly into the fray among the circuits over ascertainability: expressly rejecting the Third Circuit's position (*Carrera v. Bayer*), and aligning itself instead with the Sixth (*Rikos v. Procter & Gamble*), Seventh (*Mullins v. Direct Digital, LLC*), and Eighth Circuits (*Sandusky Wellness Center v. Medtox Science*). Courts in the Ninth Circuit had largely declined to follow *Carrera* in past cases, but *Briseno* appears to put the nail in its coffin. Given the volume of consumer class actions filed in the Ninth Circuit, the court's entry into this debate sets the stage for the Supreme Court to weigh in — whether in *Briseno* or a future appeal.

In the interim, defendants looking to defeat class certification in demonstrably unwieldy consumer class actions may still do so under Rule 23(b)(3)'s superiority criterion, which requires that courts account for manageability concerns. The facts of *Briseno* were distinctive in that the product labels at issue were largely uniform: they had not changed materially over the relevant timeframe, as the "100% Natural" claim that the plaintiffs challenged "appeared on every bottle of Wesson-brand oil throughout the putative class periods." In other words, in order to demonstrate her membership in the class, a consumer only needed to recall and attest that she purchased *any* bottle of any Wesson oil during the class period.

By contrast, other Ninth Circuit courts have denied certification in cases where it was more difficult to determine which class members actually purchased mislabeled products. In *Jones v. ConAgra Foods*, for example, Judge Charles Breyer denied certification on ascertainability grounds because "there were literally dozens of varieties [of Hunt's products] with different can sizes, ingredients, and labeling over time," and "some Hunt's cans included the challenged language, while others included no such language at all." (The plaintiffs' appeal of that decision to the Ninth Circuit was stayed on July 12, 2016.)

And in *Bruton v. Gerber Products*, Judge Lucy Koh denied class certification where the proposed class comprised consumers who purchased 69 different types of baby food with varying labels over the course of four years. As Gerber argued on appeal in that case, the Ninth Circuit could potentially uphold Judge Koh's decision on the basis that the proposed class was unmanageable or that individual issues predominated, without invoking ascertainability. The Ninth Circuit just heard oral argument in *Bruton* on December 13, 2016, so defendants may not need to wait long for a more helpful precedent.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.