KING & SPALDING

Client Alert

FDA & Life Sciences Practice Group

January 5, 2017

Briseno v. ConAgra Foods, Inc.: Ninth Circuit Rules That There Need Not Be An Administratively Feasible Way To Identify Class Members In GMO Natural Case

In *Briseno v. ConAgra Foods, Inc.*, an opinion issued on January 3, 2017, the United States Court of Appeals for the Ninth Circuit held that Federal Rule of Civil Procedure 23 does not require plaintiffs challenging the labeling of food and beverage products under state consumer protection laws to demonstrate an administratively feasible way to identify class members as a prerequisite to class certification.

Background

The *Briseno* case is one of hundreds of putative class-actions challenging allegedly false or misleading labeling on food and beverage products. In this case, plaintiffs contended that a "100% Natural" label on Wesson oils—which ConAgra manufactures, markets, and sells—was false or misleading because the oils contain genetically modified organisms (or "GMOs") that plaintiffs argued were "not natural."[1] The plaintiffs moved to certify eleven state-based classes of consumers of the oil, and ConAgra objected 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 members of the classes.[2] As ConAgra pointed out, consumers do not generally save receipts proving their purchases and would probably not remember details regarding their purchases.[3] The district court rejected this argument, and held that, at the certification stage, it was enough that an objective criterion defined the class: whether class members purchased Wesson oil during the class period.[4]

The Ninth Circuit's Opinion

On appeal, the Ninth Circuit affirmed the district court's decision. The court first turned to the language of Rule 23, which it explained did not mention "administrative feasibility" (what some courts have called the "ascertainability" requirement).[5] The court also noted that the Supreme Court had admonished courts not to add requirements to Rule 23 that were not explicitly there.[6]

The Ninth Circuit also acknowledged that it was deepening a split amongst the circuits on this issue. It asserted that, although its opinion was aligned with the approach to this issue taken by the Sixth, Seventh and Eighth Circuits, it

For more information, contact:

Stephen Devereaux
+ 1 678 362 8892
sdevereaux@kslaw.com

Smitha Stansbury
+1 202 626 2902
sstansbury@kslaw.com

Marisa Maleck
+1 202 626 9117
mmaleck@kslaw.com

King & Spalding
Atlanta
1180 Peachtree Street, NE
Atlanta, Georgia 30309-3521
Tel: +1 404 572 4600
Fax: +1 404 572 5100

Washington, D.C.
1700 Pennsylvania Avenue, NW
Washington, D.C. 20006-4707
Tel: +1 202 737 0500
Fax: +1 202 626 3737

www.kslaw.com

was in conflict with that of the Third Circuit (and potentially also the First, Second, and Fourth Circuits) which require putative class representatives to demonstrate "administrative feasibility" as a prerequisite to class certification.[7]

The court also determined that ConAgra's concerns were best considered under Rule 23(b)(3), which requires courts to consider whether a class action is superior to other methods of adjudication in cases involving money damages.[8] However, the court suggested in dicta that administrative feasibility concerns would likely give way in suits involving "inexpensive consumer goods" like this one "in which there may be no realistic alternative to class treatment."[9]

The Significance of *Briseno* for Food and Beverage Class Actions

This case is significant for companies faced with class-action challenges to their food and beverage labeling. Many of these cases are brought in California, and this case seems to sharply limit what was once a strong defense against class certification in California.[10] In light of this ruling, food and beverage companies may even see an uptick in the number of suits filed against them in California.

However, companies facing litigation outside the Seventh and Ninth Circuits should consider pressing forward with the argument that courts should not certify classes challenging the labels on inexpensive food and beverage products because there is no reliable way to determine the class members. Although the Ninth Circuit contends that the Sixth and Eighth Circuits have rejected this argument, the court overstated the holdings in those cases. In fact, the Eighth Circuit case that the Ninth Circuit relies on holds that "a class must be adequately defined and clearly ascertainable"; it merely does not specify in detail what that rule means.[11] The same is true of the Sixth Circuit case, which simply upheld certification where the plaintiff had shown that class members could be identified using records of customer membership cards or records of online sales.[12] Moreover, as the Ninth Circuit admitted, the ascertainability defense has salience in the First, Second, Third, and Fourth Circuits.[13] The Ninth Circuit also failed to mention that the Eleventh Circuit has accepted a strong version of the ascertainability defense, albeit in an unpublished opinion.[14] Only the Seventh Circuit appears to agree explicitly with the Ninth Circuit that there is no heightened ascertainability requirement.[15] It follows then that food and beverage companies should continue asserting this defense outside the Seventh and Ninth Circuits.

Going forward, even companies defending these types of suits in the Seventh and Ninth Circuits should not abandon the argument that Rule 23 incorporates a requirement that a class be ascertainable and administratively feasible. Instead, companies could—and should—repackage the argument and assert that, in class actions seeking damages, administrative concerns arising from the inability to accurately and fairly identify putative class members may prevent the proposed class from satisfying the superiority requirement of Rule 23(b)(3).[16] Such an argument may have particular heft in cases (unlike *Briseno*) in which the challenged label did not appear on every challenged product without interruption throughout the class period. In cases with labeling variations throughout the putative class period, administrative feasibility concerns are particularly acute because it is often difficult for consumers to remember whether the products they purchased bore the challenged label.[17]

Finally, more broadly, *Briseno* also deepens a split amongst the federal courts of appeals as to whether a class action plaintiff must prove that there is a generally reliable way to identify class members before a court can certify a class. Given the clear split, the Supreme Court may soon weigh in. If it does, the viability and the bounds of this defense would inevitability change.

---

[1] *Briseno v. ConAgra Foods, Inc.*, No. 15-55727, 2017 WL 24618, at *1 (9th Cir. Jan. 3, 2017).
[2] *Id*., at *2.
[3] *Id*., at *3.
[4] *Id*., at *2.
[5] *Id*., at *3–4.
[6] *Id*., at *4.
[7] *Id*., at *5 (citing *Byrd v. Aaron's Inc.*, 784 F.3d 154 (3d Cir. 2015); *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013)).
[8] *Id*., at *6.
[9] *Id*.
[10] *See, e.g.*, *Xavier v. Philip Morris USA Inc.*, 787 F.Supp.2d 1075, 1089–90 (N.D. Cal. 2011); *Jones v. ConAgra Foods, Inc.*, No. C 12–01633 CRB, 2014 WL 2702726, at *8–11 (N.D. Cal. June 13, 2014), appeal docketed, No. 14-16327; *Sethavanish v. ZonePerfect Nutrition Co.*, No. 12–2907–SC, 2014 WL 580696, at *5–6 (N.D. Cal. Feb. 13, 2014).
[11] *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 996 (8th Cir. 2016).
[12] *Rikos v. Proctor & Gamble Co.*, 799 F.3d 497, 526–27 (6th Cir. 2015).
[13] *See Briseno*, 2017 WL 24618, at *5 & n.6.
[14] *See Karhu v. Vital Pharmaceuticals, Inc.*, 621 Fed.Appx. 945 (11th Cir. 2015).
[15] *See Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015). To be sure, the Sixth and Eighth Circuits have announced a less rigorous ascertainability standard than have the other circuits, but companies should consider pressing forward with the argument nevertheless.
[16] *See* Fed. R. Civ. P. 23(b)(3).
[17] *See, e.g.*, *Bruton v. Gerber Prod. Co.*, No. 12-CV-02412-LHK, 2014 WL 2860995, at *6 (N.D. Cal. June 23, 2014); *Jones*, 2014 WL 2702726, at *1–3.