

The Ninth Circuit's Briseno Decision Is Not As Bad As It Looks for Consumer Class Action Defendants

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The Ninth Circuit's decision this week in *Briseno v. ConAgra Foods, Inc.*, No. 15-55727, refused to engraft an "administrative feasibility" requirement to Federal Rule of Civil Procedure 23's prerequisites for certifying a class action. What this means, basically, is that in Ninth Circuit courts, a named plaintiff seeking class certification need not "demonstrate an administratively feasible way to identify *all* class members at the certification stage." (Slip Op. at 11 n.6). "All," however, is a very important word in that sentence.

On the face of it, the Ninth Circuit's decision conflicts with the Third Circuit's decision in *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013) and later cases. The Third Circuit explicitly requires class plaintiffs to demonstrate "ascertainability" at the certification stage. In reality, however, there would seem to be major areas of agreement between the Ninth Circuit's decision in *Briseno* and the Third Circuit's core holding. Consumer class action defendants still have plenty of arguments — even in the Ninth Circuit — that proposed classes fail because there will never be a reliable way to determine who is a member of the class.

The Third Circuit's ascertainability doctrine arose from two cases with facts worthy of a law school exam. In *Bayer*, 727 F.3d at 304, the named plaintiff himself could not remember when he purchased the product he was challenging and was not even sure which product he purchased. That testimony made it impossible for the Third Circuit to agree that the defendant should have to swallow affidavits from absent class members that they, too, purchased the challenged product, without being able to mount individual challenges to those affidavits. And, in *Marcus v. BMW of North America, LLC*, 687 F.3d 583, 594 (3d Cir. 2012), neither the plaintiff nor the defendant had any idea which tires were on the plaintiff's car. The plaintiffs had discarded the tires, and the defendant had no relevant records. The Third Circuit held that the plaintiff had to come forward with some kind of a plan to determine who was in the class, beyond proposing to rely on potential class members' unreliable and unsupported "say so."

To the extent the Third Circuit requires a *separate* showing of "ascertainability" that is not listed among the requirements in Rule 23(a) or (b) — separate, for example, from the requirements that common questions predominate over individual questions and that a class action be "manageable" — the Ninth Circuit refused to go that far. At the same time, however, the Ninth Circuit panel suggested it agreed with the way other Courts of Appeals had adopted the Third Circuit's core holding, focused on the predominance and manageability requirements, without going so far as to impose a separate requirement of ascertainability. *Briseno's* footnote 6 cited with approval the First Circuit's holding in *In re Nexium Antitrust Litig.*, 777 F.3d 9, 19-20 (1st Cir. 2015), that district courts must be assured "that, by the time a case reaches the liability and claims administration stages,

there will be an administratively feasible way to distinguish injured from uninjured class members.” It also cited with approval the Second Circuit’s holding in *Brecher v. Republic of Argentina*, 806 F.3d 22, 24-26 (2d Cir. 2015), “that a class definition must be objective and definite.”

It therefore is possible to read *Briseno* narrowly. The Ninth Circuit clearly held that sellers of small-ticket consumer goods do not have a free-standing defense to class certification solely because, at the class certification stage, the named plaintiff cannot say with certainty that she will be able to identify *all* purchasers of the product in a reliable manner. The court most certainly did not, however, cut off arguments that injured vs. uninjured people *never* can be reliably distinguished, or that a class definition is improperly “fail safe” because it turns on merits issues. Those defenses, grounded in the predominance and manageability requirements, remain.

Indeed, although the Ninth Circuit panel clearly was more supportive of “say so” affidavits than was the Third Circuit in *Marcus* and *Bayer*, even that part of the holding was limited. In *Briseno*, the plaintiffs asserted that (1) they had a means of calculating *aggregate* damages to be awarded to the entire class, and (2) “say-so” affidavits would arrive only “after a liability [and damages] determination has already been made.” For those reasons, the panel focused on the possibility of intentional fraud, not mistakes: “Why would a consumer risk perjury charges and spend time and effort to submit a false claim for a *de minimis* monetary recovery?” Slip Op. at 17.

The question in *Briseno* was not whether class members would reliably remember having purchased the relevant product, as in *Bayer*, or whether they would even have any way to know they were class members, as in *Marcus*. Concerned only about fraud, the Ninth Circuit said that defendants have other tools to detect and refuse bad claims by “rel[ying] on claim administrators, various auditing processes, sampling for fraud detection, follow-up notices to explain the claims process, and other techniques tailored by the parties and the court to validate claims.” Slip. Op. at 20 (internal quotation and citation omitted). If “say so” affidavits would have impacted the amount the defendant was expected to pay if it lost, the Ninth Circuit panel explicitly said it might have reached a different result: “[I]dentification of class members will not affect a defendant’s liability *in every case*.” Slip Op. at 22 (emphasis added).

To be sure, *Briseno* is a setback for consumer class action defendants in the Ninth Circuit. It also deepens a Circuit conflict and increases the odds of Supreme Court review. Absent high court review, however, or while we are awaiting it, *Briseno* need not be a significant setback. “Ascertainability” may be out as a free-standing requirement in the Ninth Circuit, but plaintiffs still have to satisfy predominance and manageability, and may not be able to do so if they cannot objectively and reliably determine who is in their proposed class.