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Ninth Circuit Deepens Split on Class Action 'Ascertainability'

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Throwing its weight on one side of a widening circuit split, the U.S. Court of Appeals for the Ninth Circuit on Tuesday refused to adopt stricter standards for class certification in cases where there is no readily apparent way to identify class members.

The case, which involved the labels on Wesson cooking oils, addressed the question of ascertainability, a term coined by the class action bar, which has received increased attention as more cases get filed over cheap goods.

Defense lawyers for ConAgra Foods Inc. argued that class certification should be reversed because class members couldn't be identified. As is the case with many low-priced goods, its lawyers wrote, consumers generally don't save grocery receipts and might not even remember the purchase of a particular cooking oil.

In Tuesday's opinion, the Ninth Circuit disagreed, finding that the rule governing class actions doesn't require plaintiffs attorneys to lay out an administratively feasible plan to identify class members at the certification stage. The Ninth Circuit joins the Sixth, Seventh and Eighth circuits in rejecting a higher hurdle for ascertainability.

"Class actions involving inexpensive consumer goods in particular would likely fail at the outset if administrative feasibility were a freestanding prerequisite to certification," Circuit Judge Michelle Friedland wrote in *Briseno v. ConAgra*. "The authors of Rule 23 opted not to make the potential administrative burdens of a class action dispositive and instead directed courts to balance the benefits of class adjudication against its costs."

Plaintiffs attorney Adam Levitt, director in the Chicago office of Grant & Eisenhofer, had warned at oral arguments in September that raising the standard on ascertainability would mean the death of several consumer class actions. "We believe that by its *ConAgra* opinion, the Ninth Circuit is establishing a beachhead on the right side of the law on this very important issue, ensuring access to justice for consumers and others," Levitt said Tuesday.

ConAgra was represented by Angela Spivey, Atlanta managing partner at McGuireWoods. ConAgra spokesman Mike Cummins said in an email: "While we are disappointed by the Ninth Circuit's order, ConAgra is confident it will ultimately prevail on the merits."

The case alleged that Wesson bottles labeled as "100% Natural" were false and misleading because the cooking oils contained genetically modified organisms. ConAgra was challenging certification of classes in 11 states.

In arguing for ascertainability to be considered before class certification, ConAgra's lawyers seized on a string of 2013 rulings from the U.S. Court of Appeals for the Third Circuit that required plaintiffs to provide a "reliable and administratively feasible" method to identify class members. Several circuits have followed by adopting some ascertainability requirement, while others have taken a more liberal view that consumer affidavits are enough to establish eligibility for the class.

The issue is particularly relevant in cases involving food labels, since most consumers don't have receipts, leaving plaintiffs attorneys to rely on retailer records and affidavits. So far, the U.S. Supreme Court has rejected petitions on the issue.

In Tuesday's opinion, the Ninth Circuit brushed off concerns raised by the Third Circuit that an administratively feasible plan is necessary to ensure that class members get adequate notices and to prevent fraudulent claims. The Ninth Circuit also brushed off due process concerns, particularly given the numerous opportunities defendants have to challenge plaintiffs' claims after certification.

Friedland was joined by U.S. Circuit Judges William Fletcher and Morgan Christen.

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