Bloomberg BNA

Product Safety & Liability Reporter™

VOL. 45, NO. 2 JANUARY 9, 2017

Food

Consumers: ConAgra Ruling Big Boon for Other Fraud Cases

Many other consumers in labeling fraud suits stand to gain from a new Ninth Circuit decision allowing buyers of ''natural'' Wesson Oil to sue ConAgra Foods, Inc. as a class, consumer advocates say.

''The significant part is that the opinion is a masterful affirmation of the rights of consumers to bring class actions where they have been defrauded,'' Stephen Gardner, a plaintiffs' lawyer and director of the food law practice at the Stanley Law Group in Dallas, told Bloomberg BNA.

The ruling will help plaintiffs in hundreds of food and drink deceptive label suits pending in district courts in the U.S. Court of Appeals for the Ninth Circuit, particularly in the Northern District of California, which has been dubbed the ''food court.''

Consumers in this case allege ConAgra's ''100 percent natural'' label on its oil is deceptive because it contains genetically modified ingredients.

The court said Jan. 3 that the rules governing class certification don't require consumers in suits over low-cost items to show they have some specific, objective method of identifying buyers, such as product receipts, to proceed as a class (*Briseno v. ConAgra Foods, Inc.*, 2017 BL 138, 9th Cir., No. 15-55727, 1/3/17).

The text of the rule warrants this conclusion, the panel of judges said in an opinion that combed through the language and structure of Fed. R. Civ. P. 23.

The appeals court also discounted concerns raised by ConAgra that, without such a stricter approach, consumers who never actually purchased their products would fraudulently claim class membership.

It's unlikely that consumers would take the risk of making illegitimate claims for a small amount of money, and administrative procedures exist to validate claims, the court said.

The U.S. Court of Appeals for the Ninth Circuit rejected the stricter, proof-of-purchase approach taken by the Third Circuit in *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013).

The decision ''further solidifies the scope and proper application of Rule 23,'' Ariana J. Tadler of Millberg LLP in New York told Bloomberg BNA.

''The decision also reaffirms the protections offered by Rule 23 to consumers, especially in cases where individual damages may be relatively small,'' said Tadler, co-lead counsel for the plaintiffs.

''What's important about this ruling is that the 9th Circuit chose to focus on what Rule 23 actually says,'' Adam Levitt of Grant & Eisenhofer in Chicago told Bloomberg BNA.

The Ninth Circuit was ''unwilling to engage in judicial advocacy and refused to expand on Rule 23's purpose and intent,'' said Levitt, co-lead counsel, and who argued for the plaintiffs at the Ninth Circuit.

The decision ''ensures that class actions remain available to protect all types of transactions and occurrences, and not merely those where each potential class member's name and address happen to be recorded,'' plaintiffs' class action attorney Tim Blood of Blood Hurst & O'Reardon, LLP in San Diego told Bloomberg BNA.

''Under *Briseno*, the class action device can continue to fulfill one of its primary purposes—to provide redress where a large number of consumers are cheated out of small amounts of money—the very types of cases where identifying information about consumers frequently is not collected or maintained,'' Blood said.

Defenses Still Available. But attorneys who defend big food and beverage companies told Bloomberg BNA the decision doesn't really change the law in the Ninth Circuit and still leaves plenty of ways to stave off class actions.

Many district courts in the Ninth Circuit have long refused to apply *Carrera* anyway, Dale Giali of Mayer Brown in Los Angeles said.

''I don't believe industry has ever held out much hope on the *Carrera* issue in the Ninth Circuit,'' he said.

Defense attorneys also characterized the court's published opinion as narrow.

The decision addresses a single issue: whether there is a need as part of a class certification motion for plaintiffs to come forward with contemporaneous, objective indicia of class membership, Giali said.

Any many questions related to whether these kinds of fraud suits can be certified still need answers.

''The bottom line is that the importance of the decision is what the court did not decide,'' defense attorney David Biderman of Perkins Coie LLP in Los Angeles told Bloomberg BNA.

''Importantly, the court left unresolved the major class certification questions in these food consumer class actions: the proof necessary for reliance, whether classwide reliance was necessary, the standard for defining the materiality of the challenged term, or the necessary proof for showing classwide damages,'' Biderman said.

This means these issues will continue to be litigated in the district courts and the decision preserves signifi-

 ISSN 0092-7732

cant defenses for defendants in these food consumer class actions, he said.

Joining the Majority. The Ninth Circuit joins the Sixth, Seventh and Eighth circuits, which haven't grafted class membership criteria onto the class action rules.

Rule 23's enumerated requirements for class certification already address the concerns that motivated the Third Circuit's tough test, including case management, protecting absent class members, avoiding fraudulent claims and ensuring due process rights of defendant, the Ninth Circuit said.

''The court's discussion of proposed problems often applies real-world facts to reject theoretical problems,'' Gardner said.

As to the Third Circuit's concern about fraudulent claims, the Ninth Circuit questioned why a consumer would risk perjury charges ''for a de minimis recovery.''

And courts can rely on claims administrators and auditing processes to minimize illegitimate claims, the court said.

The ''red herring of fraud by non-class members is completely unjustified by reality—it just doesn't happen to any real extent,'' Gardner said.

''And, as the court noted, there is no logic in thinking many people would engage in perjured fraud to get back twenty bucks,'' he said.

In a separate unpublished opinion, also released Jan. 3, the court affirmed class certification against ConAgra's challenges based on other class action requirements.

For example, the court upheld the plaintiffs' proposed method of showing classwide damages attributable to the price premium they paid for the oil.

The U.S. District Court for the Central District of California said the consumers could proceed as a certified class because the class was defined by an objective criterion: whether they bought Wesson oil during a certain date range.

''While we are disappointed by the Ninth Circuit's order, ConAgra is confident it will ultimately prevail on the merits,'' the company said in a statement.

Pending Appeal in Another Label Case. A different panel of Ninth Circuit judges recently heard an appeal in *Bruton v. Gerber Prods. Co.*, 9th Cir., No. 15-15174, another food labeling suit that also raised the issue of what's required to show membership in a class.

In that case, a California woman alleged label claims on Gerber Products baby food made the products appear healthier than competitors' baby food.

The baby food case was argued Dec. 13, but the court put off its decision until after the ruling in the Wesson oil case. The parties in the Gerber suit now must file briefs addressing the decision.

That case, though, involves many more products and labels than this suit against ConAgra, which involved one label throughout the class period. The Northern District of California said there were too many products and labels for consumers to accurately remember their baby food purchases, prompting the appeal to the Ninth Circuit.

But this latest legal ruling in the Wesson Oil suit still leaves room for the Ninth Circuit to affirm the district court's refusal to certify a class in the baby food case, Giali said.

''To me, *Bruton* is ascertainability on steroids,'' he said.

Giali said, for example, the Wesson oil decision leaves room for Gerber to challenge class status under the requirement that a class action be the superior method for resolving the case.

Judge Michelle T. Friedland wrote the published opinion. Judges William A. Fletcher and Morgan B. Christen also heard the case.

Adam J. Levitt of Grant & Eisenhofer P.A. in Chicago argued for plaintiff Robert Briseno. Ariana J. Tadler of Milberg LLP in New York is co-lead counsel for the plaintiffs.

Angela Spivey of McGuire Woods in Atlanta argued for ConAgra.

BY JULIE A. STEINBERG

To contact the reporter on this story: Julie A. Steinberg in Washington at jsteinberg@bna.com

To contact the editor responsible for this story: Steven Patrick at spatrick@bna.com

The opinion is available at http://www.bloomberglaw.com/public/document/Briseno_v_ConAgra_Foods_Inc_No_1555727_2017_BL_138_9th_Cir_Jan_03.