

Key Class Action Takeaways From *Briseno V. ConAgra Foods*

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In *Briseno v. ConAgra Foods, Inc.*, ___ F.3d ___ (9th Cir. Jan. 3, 2017), the Ninth Circuit held that Rule 23 does not require plaintiffs to establish an “administratively feasible” means of identifying putative class members, expressly rejecting decisions like *Carrera v. Bayer Corp.*, 727 F.3d 300, 306-08 (3d Cir. 2013). But the decision goes well beyond administrative feasibility. Plaintiffs counsel will argue that the decision also endorses aggregate liability and damages determinations in consumer fraud cases to be followed by a “claims process” overseen by claims administrators. The impact of the decision remains to be seen, but *Briseno* is bad news for class action defendants, as it likely will make class certification easier in the Ninth Circuit. This article discusses the *Briseno* decision and offers key takeaways for future cases.



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The Ninth Circuit’s *Briseno* Decision

The *Briseno* case is one of many class actions challenging food labels. These cases have become substantially more popular in the plaintiffs’ bar, because they do not usually present any opportunity for defendants to move them into arbitration based on class action waivers in arbitration agreements. Customers who buy off the shelf do not agree to arbitrate their claims.

The *Briseno* plaintiffs claim that a “100% Natural” label is false or misleading because Wesson oils are made from bioengineered ingredients, which the plaintiffs argue are not “natural.”

The defendant argued that class certification should be denied because plaintiffs did not propose a way to identify class members and could not show that an administratively feasible method existed because consumers generally do not save grocery receipts and are unlikely to remember details about individual purchases of a low-cost product like cooking oil. In other words, consumers’ self-identification of what product they bought and how much they paid (as much as four years before any complaint was filed) should not be sufficient to establish class membership and entitlement to share in any recovery. The district largely rejected these points and certified a class.

On appeal under Rule 23(f), the Ninth Circuit affirmed the class certification order,



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rejecting the defendant's argument that the plaintiffs were required to demonstrate an administratively feasible way other than consumer self-identification to identify individuals who had purchased Wesson oils:

A separate administrative feasibility prerequisite to class certification is not compatible with the language of Rule 23. Further, Rule 23's enumerated criteria already address the policy concerns that have motivated some courts to adopt a separate administrative feasibility requirement, and do so without undermining the balance of interests struck by the U.S. Supreme Court, Congress and the other contributors to the rule.

Key Takeaways from Briseno

Unless reversed or modified, Briseno means that, in the Ninth Circuit, class action plaintiffs are not required to establish an administratively feasible way to identify putative class members in order to have a class certified. The decision tracks recent decisions in the Sixth and Seventh Circuits, which also have rejected the Third Circuit's feasibility requirement. See *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 525 (6th Cir. 2015); *Mullins v. Direct Digital LLC*, 795 F.3d 654, 658 (7th Cir. 2015).

But aside from the court's holding on administrative feasibility, the Ninth Circuit's opinion addresses several arguments often raised in class actions in ways that are mostly unhelpful for class action defendants. Here are a few key takeaways from the decision:

- **“Ascertainability” is not dead:** Many courts and litigants use the term “ascertainability” to refer to different types of class certification issues, one of which is administrative feasibility. But as the Briseno opinion acknowledges, there are other forms of “ascertainability,” including the requirement that the class be defined using objective criteria and that the definition not be too vague or overbroad. Although the Ninth Circuit rejects administrative feasibility as a separate requirement, the court cites *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1138 & n.7 (9th Cir. 2016), which addressed challenges to overbroad class definitions in the context of Rule 23(b)(3)'s predominance requirement and also acknowledged the potential for improper “fail-safe” classes that define the putative class based on an element of liability. Therefore, even after Briseno, certain “ascertainability” challenges appear to be alive and well, although they likely need to be couched in the context of one of Rule 23's express requirements.
- **“Administrative feasibility” is not dead either:** Briseno should not be read to mean that the difficulty of identifying putative class members is now irrelevant to class certification. To the contrary, the Ninth Circuit's opinion expressly recognizes that concerns about identifying the putative class may be analyzed within the context of Rule 23(b)(3)'s superiority requirement, which includes “the likely difficulties in managing a class action.” The feasibility of identifying putative class members also can be analyzed in the context of Rule 23(b)(3)'s predominance requirement as an additional individualized issue to be compared against any allegedly “common” issue or issues. That said, the Ninth Circuit has made clear that administrative feasibility is not a separate class certification requirement, and therefore these arguments will need to be presented within the context of Rule 23's express requirements.

In addition, the Ninth Circuit has said that manageability alone is not a sufficient basis to deny class certification, and so any administrative feasibility challenge will need to be combined with other challenges to certification. All of this likely means that administrative feasibility has little if any role to play when evaluating requests for class certification under Rule 23(b)(1) or (b)(2),

which are not subject to the superiority requirement, and only a supporting role to play in cases where plaintiffs seek certification under Rule 23(b)(3).

- **The Briseno opinion may be a boon for class action administrators:** In two separate sections of the opinion, the Ninth Circuit refers to the role of class action administrators, first in identifying fraudulent claims and also in evaluating defense challenges to a class member's individual claims for damages. The discussion of these issues is dicta, but the Ninth Circuit appears to believe that class action administrators have a major role to play, not only in addressing class settlements, but also in certified class actions that are litigated to conclusion. The use of class administrators to identify class members had been proposed and rejected by other courts post-Carrera, and the added expense charged to the class to pay for administrators to provide this service might give weight to challenges under superiority, particularly in motions to decertify marginal Rule 23(b)(3) classes.
- **Arguments about fraudulent claims are unlikely to carry much weight:** In rejecting a separate administrative feasibility requirement, the Briseno opinion brushed aside concerns about absent class members submitting fraudulent claims, calling the risk "low, perhaps to the point of being negligible." The court noted that district courts "can rely, as they have for decades, 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 avoid or minimize fraudulent claims." With this language, and without citing any evidence to support it, the Ninth Circuit appears to have concluded that the risk of fraudulent claims is not a reason to deny class certification.
- **Arguments about a defendant's due process right to challenge class member claims appear to have taken a hit:** In Briseno, the Ninth Circuit rejected arguments that a class could not be certified because a defendant has a due process right to challenge each putative class member's claim. The court framed the issue as whether "defendants must have an opportunity to dispute whether class members really bought the product or used the service at issue," and concluded that certification would not hinder these rights. In the court's view, the defendant always has the right to challenge whether the named representatives bought the product and "will have similar opportunities to individually challenge the claims of absent class members if and when they file claims for damages" through the claims administration process.

The court specifically rejected the idea that a defendant's due process rights would be infringed by the need to obtain class member affidavits as part of a claims process. The court noted that, in litigation, a consumer affidavit attesting that he or she had purchased a product generally is sufficient to create a genuine issue of material fact requiring a trial. The court reasoned: "[g]iven that a consumer's affidavit could force a liability determination at trial without offending the due process clause, we see no reason to refuse class certification simply because that same consumer will present her affidavit in a claims administration process after a liability determination has already been made."

- **Did the Ninth Circuit endorse aggregate damages determinations in consumer fraud cases?** In what may be the most troubling part of the Briseno opinion, the Ninth Circuit addressed the plaintiffs' damages methodology in a way that might be read (incorrectly) as an endorsement of aggregate damages determinations. The court explained that "Plaintiffs propose to determine ConAgra's aggregate liability by (1) calculating the price premium attributable to the allegedly false statement that appeared on every unit sold during the class period, and (2) multiplying

that premium by the total number of units sold during the class period.” Concluding that a “defendant will generally know how many units of a product it sold in the geographic area in question,” the Ninth Circuit reasoned that plaintiffs’ price premium theory would allow the defendant to know the aggregate amount of liability “even if the identity of all class members is not.”

The court viewed this as an additional reason to reject an administrative feasibility requirement because the defendant’s aggregate liability, and thus its due process rights, would not be affected by any inability to know the identity of each class member. Although the court does not decide whether an aggregate damages determination is permissible in consumer fraud cases and appears to acknowledge that this issue would be governed by applicable substantive law, plaintiffs’ lawyers are sure to argue that *Briseno* allows the district court to decide damages on an aggregate basis for the entire class, followed by a claims process where class members can claim their part of the aggregate award.

- **Are defendants better off in state court after *Briseno*?** Several California appellate decisions have recognized a separate ascertainability requirement for class certification and held that a failure to satisfy that requirement is a sufficient basis for denying certification. See, e.g., *Sevidal v. Target Corp.*, 189 Cal. App. 4th 905, 919 (2010) (“Ascertainability ... goes to the heart of the question of class certification,’ and ‘requires a class definition that is precise, objective and presently ascertainable....”). Other decisions have addressed ascertainability in far more lenient terms. See, e.g., *Aguirre v. Amscan Holdings, Inc.*, 234 Cal. App. 4th 1290, 1306 (2015) (“Where, as here the class (as currently defined) describes a set of common characteristics sufficient to allow a member of that group to identify himself or herself as having a right to recover based on the description, and the plaintiff has proposed an objective method for identifying class members when that identification becomes necessary, there exists an ascertainable class.”). But depending on the case, class action defendants may want to evaluate whether, after the *Briseno* decision, they are better off litigating class certification in state court.
- **Increased settlement pressure and administrative burden on courts:** By doing away with any administrative feasibility requirement, the *Briseno* decision likely will make it easier for plaintiffs to obtain class certification, which will increase pressure on defendants to settle class actions. At the same time, class action defendants have been increasingly willing to try dubious cases, and thus the Ninth Circuit’s decision could mean more class actions proceeding to trial. The challenges of managing a certified class through trial may lead to greater administrative burdens on our courts, and perhaps to additional opportunities for decertification once those burdens become clear.

The ultimate impact of *Briseno* is, of course, unclear. The case may be reheard or the U.S. Supreme Court may accept the case for review. But if it stands, *Briseno* is almost certain to make class certification easier in the Ninth Circuit, as it disposes of any separate administrative feasibility requirement. The opinion may have even broader ramifications, particularly in the area of aggregate damages, depending on how district courts interpret and apply it. Regardless, the decision underscores the need to take class actions seriously, as even minor consumer disputes can become major problems when magnified through the lens of Rule 23.

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