

**Holly Stein Sollod**

Partner
303.295.8085
Denver
hsteinsollod@hollandhart.com

Circuit Split Deepens as 9th Circuit Rejects 'Ascertainability' in Class Certification

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On January 3, 2017, in *Briseno v. ConAgra Foods, Inc.*, No. 15-55727, 2017 U.S. App. LEXIS 20 (9th Cir. Jan. 3, 2017), the Ninth Circuit Court of Appeals affirmed the certification of a class and held that the language of Federal Rule of Civil Procedure 23 neither provides nor implies that demonstrating an administratively feasible way to identify class members is a prerequisite to class certification. The panel joined the Sixth, Seventh, and Eighth Circuits in declining to adopt an administrative feasibility requirement that has been adopted by the Third, Second, Fourth, and Eleventh Circuits.

The case involved a putative class action brought against ConAgra Foods in eleven states by consumers who purchased Wesson-brand cooking oil products labeled "100% Natural" during the relevant period. The Plaintiffs argued that the "100% Natural" label was false or misleading because Wesson oils are made from bioengineered ingredients that plaintiffs contend are "not natural." ConAgra manufactures, markets, distributes, and sells Wesson products.

The U.S. District Court for the Central District of California granted class certification. The issue on appeal was whether Rule 23 requires class representatives to demonstrate that there is an administratively feasible means of identifying absent class members in order to obtain class certification. The Ninth Circuit held that Rule 23 "does not impose a freestanding administratively feasible prerequisite to class certification," and it "declined to interpose an additional hurdle into the class certification process delineated in the Rule." Rather, the Court will continue to address ascertainability-related issues, for example, overbroad class definitions or uninjured class members, through other Rule 23 requirements, such as superiority, commonality, or predominance.

The Ninth Circuit spent much of its opinion criticizing the Third Circuit's opinion in *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013) which held that plaintiffs are required to demonstrate a feasible way to identify who is in the class. In *Carrera*, the Third Circuit addressed a Rule 23(f) appeal by Bayer Corporation attacking the certification of a class of consumers who purchased Bayer's One-A-Day WeightSmart diet supplement in Florida. The sole issue on appeal was whether the class members are ascertainable. The Third Circuit expressed due process concerns particularly in consumer cases, where class members are unlikely to have documentary proof of purchase, such as packaging or receipts. The Ninth Circuit held that the "policy concerns that motivated the Third Circuit to adopt a separately articulated requirement are already addressed by the Rule."

The Second Circuit in *Brecher v. Republic of Argentina*, 806 F.3d 22 (2d Cir. 2015), the Fourth Circuit in *EQT Production Co v. Adair*, 764 F.3d 347 (4th Cir. 2014), and the Eleventh Circuit (in an unpublished decision) in *Karhu v. Vital Pharmaceuticals, Inc.*, 621 F. App'x 945 (11th Cir. 2015) have followed the Third Circuit's approach in *Carrera*.

As a result of this decision, the courts of appeals are deeply split on whether plaintiffs must show an administratively feasible way to identify actual class members as a *prerequisite* of class certification, not just at the claims administrative stage.