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FOOD

CERTIFICATION

Consumers challenging food and beverage labeling have generally found the path to class certification easier in the Ninth Circuit than in the Third. This BNA Special Report, which includes the views of several leading practitioners, finds that while some district judges in the Ninth Circuit have found the ascertainability requirement to certification met, other judges have rejected class status where membership is too difficult to determine.

The report, another in an occasional series on food and beverage litigation (41 PSLR 1420, 11/25/13), also examines the Third Circuit's decision in *Carrera v. Bayer Corp.*, and what could happen if the Ninth Circuit were to adopt that high hurdle to determining class membership in consumer food litigation.

Courts in Ninth Circuit Diverge on Ascertainability in Food Label Suits, But *Jones v. ConAgra Foods* May Offer Clear Direction on Class Certification

Consumers suing over food labels currently have an easier time gaining class certification in the Ninth Circuit than in the Third, where *Carrera v. Bayer Corp.* requires plaintiffs to scale a steep wall to show who belongs to the class.

The U.S. Court of Appeals for the Ninth Circuit hasn't weighed in on the level of proof needed to show ascertainability in consumer cases against food producers, leaving courts within the circuit wide discretion as to whether plaintiffs challenging food and beverage labeling have put forth, at the certification stage, an adequate means of identifying class members.

But Ninth Circuit guidance may be coming as a recent appeal of a decision denying class certification in suits challenging the labels of Hunt's tomato products, Pam cooking spray and Swiss Miss cocoa gives the San Francisco-based court a chance to consider ascertainability in the food labeling context, a significant development given that most such false labeling cases are filed there.

If the Ninth Circuit were to adopt the *Carrera* approach, ''We believe it would significantly impact the showing required of plaintiffs, making it more rigorous,'' food and beverage defense attorney Dale J. Giali, of Mayer Brown in Los Angeles told Bloomberg BNA in a recent e-mail.

Courts that have rejected ascertainability arguments against certification ''tend to focus on the result that would transpire if the ability to identify class members becomes a determining factor in class certification—the end of class actions involving low value products,'' Anthony Anscombe, another attorney who has defended food labeling cases, told Bloomberg BNA recently.

''I agree that an ascertainability requirement in food litigation would very likely spell the end of such litigation as we know it, but this strikes me as a political preference rather than a legal justification,'' Anscombe, co-chair of the Food Law and Class Action practices at Sedgwick LLP in Chicago, said.

Until the Ninth Circuit hands down a decision addressing ascertainability, however, district judges within the circuit will continue to consider a variety of factors when weighing whether consumer classes are identifiable in food labeling cases.

This BNA Special Report examines the ascertainability issue, particularly within the Ninth Circuit. It shows

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that while consumers there generally have an easier time than in the Third Circuit surmounting this class certification hurdle, judges have rejected class status where members would just be too difficult to determine.

For example, certification has been denied in cases where too many products, or too many different labels, are involved, causing significant confusion on the part of consumers as to whether they actually bought the allegedly misleading food and beverage items at issue.

The case on appeal to the Ninth Circuit is *Jones v. ConAgra Foods Inc.* (9th Cir., No. 14-16327).

Implicit Requirement

Although ascertainability isn't written into Fed. R. Civ. P. 23, which details the requisites for class certification, courts view it as an implicit requirement for certification.

Courts generally hold that a class is ascertainable if it's defined with ''objective criteria'' and it's ''administratively feasible'' to determine whether a particular individual is a member.

That gives rise to questions.

Does a putative class representative need to show that the proposed class can be ascertained through available sales records or other independent evidence to corroborate membership?

Or can a class representative demonstrate membership by defining the class in a way that allows prospective plaintiffs to identify themselves as class members—for example, all California consumers who bought Product X with the allegedly deceptive language in the four years leading up to the class notice—and allow members to self-identify through, for example, affidavits?

The U.S. Court of Appeals for the Third Circuit remains the only federal appeals court to have required corroborative proof in consumer cases.

The court held, in a suit over weight-loss supplements, that the plaintiffs couldn't rely on affidavits or retail sales records to show who had bought the products (*Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013)) (41 PSLR 1005, 8/26/13).

Rehearing was denied in May.

The *Carrera* court said sales records or other reliable evidence of product purchases must be available for a class to be found ascertainable. Bayer Corp. didn't sell the product directly to consumers and, therefore, didn't have a list of purchasers.

The court said plaintiffs who intend to use retailer records must produce sufficient evidence to show this approach will identify class members.

The Third Circuit said a court must be able to determine at the outset who belongs to the class, and cited the defendant's right to challenge an individual's class membership.

That's not the law in the Ninth Circuit, where district courts, at least to date, have held it's not necessary that class members be identified at the time of certification.

Varying Views

Still, courts within the Ninth Circuit have expressed varying views when looking at the ascertainability requirement.

Some courts have said self-reporting can be unreliable, undercutting a defendant's due process right to challenge class membership.

Others have cited the policies underlying class litigation and have expressed concern that unrealistic expectations about who holds onto receipts for small-ticket items would take away remedies.

In some cases, courts have focused on the impracticality of identifying class members, Anscombe, of Sedgwick, told Bloomberg BNA in a Sept. 23 e-mail.

''This is important. The parties need to know who class members are so that they know who is bound by the judgment and who isn't,'' said Anscombe.

''Also, if class members cannot identify themselves, they will not have any ability to obtain whatever benefits the class action is supposed to confer,'' he said. ''They also will not be able to exercise their right of exclusion, which is a right of constitutional significance.''

Anscombe added, ''The overall effect of certifying a class whose members cannot be identified is that the class action device loses its compensatory function and takes on a punitive function which is absent from Rule 23 and the Rules Enabling Act.''

Carrera Hard to Meet

Giali, of Mayer Brown, said the *Carrera* ascertainability standard would be hard to meet in many consumer suits over food labeling and advertising. ''For small-dollar purchases, it is difficult to develop a record of contemporaneous, objective indicia of purchases.''

As to potential use of retailer records such as online sales or loyalty program information, Giali said, ''There is definitely a role for such information in a *Carrera* showing and we already have seen plaintiffs seek this information in pending litigation.

''But, for several reasons, it is by no means an easy or perfect answer for plaintiffs to develop the record required in *Carrera*,'' Giali said.

There are very few national retailers, ''so plaintiffs would have to seek the information from many regional retailers. Subpoenaing records from separate retailers across the country is difficult, time-consuming and expensive,'' he said.

Additionally, ''Some stores do not keep such records and some consumers don't participate in the programs.''

Too Many Variables

In the meantime, factors influencing the likelihood of certification include whether the plaintiffs could tell they had bought a product with an allegedly misleading label, which can be a function of the number of products and label versions on the market simultaneously, and the timing of the class period.

Courts have declined certification where they find a ''subjective memory problem'' or other factor that would impede a class member's ability to self-identify.

Giali said it's more difficult for a plaintiff to show that a class is ascertainable if there are a lot of variables regarding products and labels.

''But, even cases with few variables have run into problems on ascertainability. *Carrera* is a good example of that,'' he told Bloomberg BNA.

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Not Always Simple

But plaintiffs' attorney Beatrice Skye Resendes cautioned against over-simplifying the odds of ascertainability based on the number of products or labels.

''For example, just because a manufacturer makes ever so slightly shifting changes in its labeling, it cannot avoid class certification simply on an ascertainability basis. Or, at least it should not be able to if the advertising message was the same,'' she told Bloomberg BNA Sept. 23.

It's appropriate to remember that ascertainability doesn't exist as an element of Rules 23(a) or (b). ''Thus, it is satisfied where an objective definition for the class exists, such that people can determine if they are class members,'' she said.

Resendes, of the Law Offices of Ronald A. Marron in San Diego, represented plaintiffs in *Allen v. Hyland's Inc.*, 2014 BL 220065 (C.D. Cal., No. 12-01150, 8/1/14) (42 PSLR 874, 8/11/14).

In *Allen*, Judge Dolly M. Gee of the Central District California granted certification in a consumer suit against a maker of homeopathic products.

That case involved 10 products, each with sizing variables, making at least 30 ''products'' in all, Resendes said. Yet, ascertainability wasn't a problem, she said.

In contrast, she referred to *Hernandez v. Chipotle Mexican Grill, Inc.* (C.D. Cal., No. 12-5543, 12/2/13) (41 PSLR 1442, 12/9/13).

In that case, Judge Dale S. Fischer, also of the Central District of California, declined to certify a class challenge to a restaurant's representations that it used ''naturally raised'' meat when some, but not all, locations used conventional fare during supply shortages.

Class members would need to know with some certainty the date, location and particular meat purchased, something they would be unlikely to recall, the court said.

''I think that case really spells out when ascertainability is not met, because the class is 'amorphous' or ''vague,' '' Resendes told Bloomberg BNA.

Getting to Yes

Several judges in the Ninth Circuit have recently certified classes in consumer labeling litigation, saying the plaintiffs demonstrated they could show who bought the product and who belongs to the class, and citing policies supporting certification in consumer litigation.

In September, California consumers challenging ''all natural'' labeling on Jamba Juice home smoothie kits won certification in the Northern District of California, but just for liability issues (*Lilly v. Jamba Juice Co.*, 2014 BL 259776 (N.D. Cal., No. 13-02998, 9/19/14) (42 PSLR 1072, 9/29/14).

Judge Jon S. Tigar found the class ascertainable, declining an invitation from the defendants to follow *Carrera* because the plaintiffs lacked purchase records.

''Adopting the *Carrera* approach would have significant negative ramifications for the ability to obtain redress for consumer injuries,'' the opinion said, because ''few people keep receipts for low-price goods.''

Yet the class action mechanism ''provides one of its most important social benefits'' in situations where individual injury is small, yet the ''cumulative injury to consumers as a group is substantial.''

The Split Over Ascertainability in the Ninth Circuit

Ascertainability Found in These Cases:

- *Allen v. Hyland's Inc.*, 2014 BL 220065 (C.D. Cal., No. 12-01150, 8/1/14) (42 PSLR 874, 8/11/14);
- *Lilly v. Jamba Juice Co.*, 2014 BL 259776 (N.D. Cal., No. 13-02998, 9/19/14) (42 PSLR 1072, 9/29/14);
- *Forcellati v. Hyland's, Inc.*, 2014 BL 98578 (C.D. Cal., No. 12-01983, 4/9/14) (42 PSLR 403, 4/21/14);
- *Brazil v. Dole Packaged Foods, LLC*, N.D. Cal., No. 12-01831, 5/30/14) (42 PSLR 563, 6/9/14);
- *Werdebaugh v. Blue Diamond Growers*, 2014 BL 144928, N.D. Cal., No. 12-2724, 5/23/14 (42 PSLR 564, 6/9/14).

Ascertainability Rejected in These Cases:

- *Hernandez v. Chipotle Mexican Grill, Inc.* (C.D. Cal., No. 12-5543, 12/2/13) (41 PSLR 1442, 12/9/13);
- *Jones v. ConAgra Foods, Inc.*, 2014 BL 164990, N.D. Cal., No. 12-01633, 6/13/14) (42 PSLR 639, 6/23/14);
- *Xavier v. Philip Morris USA, Inc.*, 787 F. Supp. 2d 1075 (N.D. Cal. 2011) (39 PSLR 455, 5/2/11);
- *Astiana v. Ben & Jerry's Homemade, Inc*, 2014 BL 3609 (N.D. Cal., No. 10-4387, 1/7/14) (42 PSLR 31, 1/13/14);
- *In re Pom Wonderful LLC*, 2014 BL 83192(C.D. Cal., No. 10-2199, 3/25/14) (42 PSLR 307, 3/31/14);
- *Sethavanish v. Zone Perfect Nutrition Co.* (N.D. Cal., No. 12-2907, 2/13/14).

And Gee and Judge George H. King of the Central District of California recently certified classes challenging the efficacy of homeopathic products.

Gee, in *Allen*, noted that ''the packaging does contain the alleged misrepresentations, and while consumers are unlikely to have retained receipts, the class period continues into the present and consumers are more likely to remember their purchases.''

The class here is based on objective criteria, Gee said: Did someone purchase one of the affected products during the class period?

King found class membership ascertainable in a homeopathic product suit involving five products, even though purchasers likely threw away their receipts and there were no retailer records identifying customers who bought Hyland's products (*Forcellati v. Hyland's, Inc.*, 2014 BL 98578 (C.D. Cal., No. 12-01983, 4/9/14)) (42 PSLR 403, 4/21/14).

The policy of facilitating small claims is central to class actions, King said in declining to follow *Carrera*.

The defendants in the *Forcellati* case petitioned to the Ninth Circuit under Fed. R. Civ. P. 23(f), but the petition was turned down in July.

And Judge Lucy H. Koh of the Northern District of California certified a California damages class and a nationwide injunctive relief class in a suit challenging the

labels of 10 Dole fruit products (*Brazil v. Dole Packaged Foods, LLC,* N.D. Cal., No. 12-01831, 5/30/14)) (42 PSLR 563, 6/9/14).

Plaintiff Chad Brazil can show, through objective criteria, that someone is a member of the class; and it is administratively feasible to determine whether a particular individual is a class member, the opinion said.

Brazil defined the class based on a purchase of the 10 identified Dole fruit products during the class period, April 11, 2008, through the date of notice.

The class definition ''simply identifies purchasers of Defendant's products that included the allegedly material misrepresentations,'' the opinion said.

In the Ninth Circuit, ''this is enough to satisfy Rule 23(a)'s implied ascertainability requirement,'' Koh said. She declined to follow the *Carrera* approach.

Dole has since sought decertification.

Koh also certified a class of almond milk purchasers in *Werdebaugh v. Blue Diamond Growers*, 2014 BL 144928, N.D. Cal., No. 12-2724, 5/23/14 (42 PSLR 564, 6/9/14).

The plaintiff has precisely defined the class based on objective criteria: purchase of Blue Diamond almond milk products within the class period that began in 2008. The class definition simply identifies purchasers of defendant's products that included the allegedly material misrepresentations, Koh said.

Where courts have denied class certification because the proposed class was not ascertainable, identification of class members posed far greater difficulties than it is likely to pose in this case, Koh said.

In August, the Ninth Circuit declined interlocutory review (42 PSLR 952, 9/1/14).

Stopping at No

Jones v. ConAgra, the case on appeal to the Ninth Circuit, involves challenges to the labels of Pam cooking spray, Hunt's tomatoes, and Swiss Miss cocoa.

The plaintiffs sought three separate classes. They argued class membership could be determined by reference to objective criteria—whether a consumer bought one of the challenged products during the class period.

For example, plaintiffs proposed having putative class members identify the Hunt's brand products they bought ''by photographic verification'' and sworn testimony.

But Judge Charles R. Breyer of the Northern District of California said because of product label changes during the class period, and times when shelves carried the same product both with and without the challenged label, it wasn't possible to determine who bought products with the contested labels (*Jones v. ConAgra Foods, Inc.*, 2014 BL 164990, N.D. Cal., No. 12-01633, 6/13/14) (42 PSLR 639, 6/23/14).

''Even assuming that all proposed class members would be honest, it is hard to imagine that they would be able to remember which particular Hunt's products they purchased from 2008 to the present, and whether those products bore the challenged statements,'' Breyer said in reference to the tomato cans.

Breyer likened the situation to that faced by Judge William Alsup, also of the Northern District of California, in *Xavier v. Philip Morris USA, Inc.*, 787 F. Supp. 2d 1075 (N.D. Cal. 2011) (39 PSLR 455, 5/2/11).

Alsup concluded that a proposed class of individuals with a 20-or-more-pack-a-year smoking history wasn't ascertainable because smokers couldn't be expected to recall the cumulative total of all the Marlboro cigarettes they smoked.

Certification could invite fraudulent or inaccurate claims and undermine the finality of judgment with respect to absent class members, he said.

Similarly, in *Astiana v. Ben & Jerry's Homemade, Inc*, 2014 BL 3609 (N.D. Cal., No. 10-4387, 1/7/14) (42 PSLR 31, 1/13/14), plaintiff Skye Astiana alleged Ben & Jerry's ice cream, frozen yogurt and popsicle products were deceptively labeled ''all natural'' when they contained cocoa processed with a synthetic alkali.

But some ice cream products contained an allegedly synthetic alkali ingredient while others didn't, and the plaintiff provided no evidence concerning which ice cream products contained which ingredient, Judge Phyllis J. Hamilton said in finding the class wasn't ascertainable.

And in *In re Pom Wonderful LLC*, 2014 BL 83192 (C.D. Cal., No. 10-2199, 3/25/14) (42 PSLR 307, 3/31/14), the court said the proposed class was unascertainable where, based on the volume of product sold, every adult in the U.S. was a potential class member, none of the packaging included the alleged misrepresentation, and few consumers were likely to have retained receipts during a class period that closed years before the action was filed.

There, Judge Dean D. Pregerson of the Central District of California decertified a consumer class, saying few consumers were likely to have retained their receipts, and there was no way to reliably determine who bought the defendant's juice products or when they did so.

Those judges didn't cite *Carrera*. But one Northern District of California judge did cite the opinion favorably in declining to certify a class.

Judge Samuel Conti found the reasoning of *Carrera* persuasive in refusing to certify a class of ZonePerfect nutrition bar purchasers who relied on ''all natural'' label representations in *Sethavanish v. Zone Perfect Nutrition Co.* (N.D. Cal., No. 12-2907, 2/13/14).

Conti acknowledged that *Carrera* may restrict the types of consumer cases that can be brought, but said the decision doesn't bar certification altogether. Retailer or banking records may make it feasible to determine class membership.

But while Conti refused certification in the *Sethavanish* case, he also said the plaintiff didn't present any method for determining class membership.

Opening briefs in the *Jones v. ConAgra* appeal to the Ninth Circuit are due Nov. 21.

An earlier Bloomberg BNA Special Report looked at the successes and failures of the primary jurisdiction defense in food labeling litigation (41 PSLR 1420, 11/25/13).

BY JULIE A. STEINBERG

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