

FRIDAY, JANUARY 6, 2017

PERSPECTIVE

Class action split deepens

By Neal Marder, Ali Rabbani
and Zak Franklin

On Tuesday, in a widely anticipated ruling, the 9th U.S. Circuit Court of Appeals added its voice to the federal circuit split over whether plaintiffs moving for class certification under Federal Rule of Civil Procedure 23 must demonstrate an “administratively feasible” means of identifying absent class members. In *Briseno v. ConAgra Foods, Inc.*, 2017 DJDAR 63 (Jan. 3, 2017), the 9th Circuit affirmed the district court’s class certification decision in a putative class action brought against ConAgra Foods by consumers who purchased Wesson-brand cooking oil products labeled “100% Natural,” holding that Rule 23 neither expressly provides nor implies that administrative feasibility is a prerequisite to class certification. The 9th Circuit joined several other federal circuits in declining to adopt an administrative feasibility requirement.

Background

The plaintiffs filed putative class actions against ConAgra in 11 states, alleging that ConAgra falsely and misleadingly marketed its Wesson-brand cooking oil products as “100% Natural” when, in fact, those products are made from bioengineered ingredients. After the cases were consolidated, the plaintiffs moved to certify classes consisting of all consumers who purchased Wesson cooking oils during the relevant class period. ConAgra opposed class certification, arguing there would be no administratively feasible method to identify members of the proposed classes. The district court granted the plaintiffs’ motion in part and certified 11 statewide classes under Rule 23(b)(3). The 9th Circuit granted ConAgra’s Rule 23(f) petition for immediate review.

On appeal, ConAgra argued that in addition to satisfying the four requirements for class certification expressly enumerated in Rule 23(a), the plaintiffs must also demonstrate the administrative feasibility of determining class membership. Specif-

ically, ConAgra argued that there was no administratively feasible means for determining class membership because consumers do not generally save grocery receipts and are unlikely to remember details of cooking oil purchases over a multi-year period. The plaintiffs, on the other hand, argued that administrative feasibility is not required for class certification, and that class members could be identified through claim forms submitted by putative class members.

The 9th Circuit’s Opinion

In affirming class certification, the 9th Circuit ruled that plaintiffs do not need to demonstrate an administratively feasible method for identifying absent class members at the class certification stage. In so ruling, the 9th Circuit sided with the 6th, 7th and 8th Circuits, and expressly rejected the 3rd Circuit’s holding that administrative feasibility is a prerequisite to class certification.

Applying traditional canons of statutory construction, the court reasoned that the drafters of Rule 23 had established four express prerequisites for class certification under Rule 23(a), commonly known as numerosity, commonality, typicality and adequacy. The court concluded that the drafters’ omission of a separate administrative feasibility requirement from Rule 23(a) can be considered intentional. In addition, the court reasoned that Rule 23(b)(3), which requires plaintiffs to prove that a class action for damages would be “superior” to other methods for adjudicating the controversy, does not limit the matters courts may consider in making this determination. According to the court, reading an administrative feasibility requirement into Rule 23(a) would also render superfluous the language in Rule 23(b)(3)(D), which requires courts to consider “the likely difficulties in managing a class action.”

The court also reasoned that imposing an administrative feasibility requirement would run afoul of *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), in which the

U.S. Supreme Court held that federal courts may not substitute or create requirements for class certification. Notably, the 9th Circuit reaffirmed that it has never expressly adopted an “ascertainability” requirement for class certification.

The 9th Circuit joined several other federal circuits in declining to adopt an administrative feasibility requirement.

The 9th Circuit went on to address the 3rd Circuit’s contrary interpretation of Rule 23. First, the court disagreed that requiring administrative feasibility would be necessary to “mitigate the administrative burdens” of trying a Rule 23(b)(3) class action, emphasizing that courts may consider such burdens in connection with the superiority requirement. The 9th Circuit also stated that requiring administrative feasibility to address manageability concerns conflicts with the “well-settled presumption” that courts should deny class certification due to manageability concerns and would leave no realistic alternative in cases involving inexpensive consumer goods.

The 9th Circuit then addressed the 3rd Circuit’s explanation that an administrative feasibility requirement is necessary to protect absent class members and to prevent fraud. With respect to protecting absent class members, the 9th Circuit said there is no requirement that potential class members be given actual notice, that classes usually have significantly less than full participation, and that lack of notice carries a minimal risk of harm to absent class members. With respect to concerns that the absence of an administrative feasibility requirement would lead to submission of illegitimate claims, the 9th Circuit considered the risk to be small, especially in class actions involving low-cost consumer goods, because consumers are unlikely to risk perjury charges for small economic gain and there are other processes to minimize fraud.

Finally, the 9th Circuit responded to the 3rd Circuit’s reasoning that the administrative feasibility requirement is necessary to allow defendants to challenge and defend individual claims. As the court explained, defendants can still mount individual challenges to the claims of the named class representatives throughout the litigation, and may challenge the claims of absent class members at the claims administration phase.

Accordingly, the 9th Circuit affirmed the lower court’s class certification decision.

Takeaways

In a long-anticipated decision, the 9th Circuit finally weighed in on the federal circuit split over whether plaintiffs must demonstrate administrative feasibility as a prerequisite to obtaining class certification under Federal Rule of Civil Procedure 23, joining some circuits and rejecting others. Notably, the 9th Circuit also stated that it has not expressly adopted an ascertainability requirement for class certification, explaining that it has instead addressed ascertainability issues through analysis of Rule 23’s enumerated requirements.

While the court’s ruling precludes class action defendants in the 9th Circuit from challenging class certification based on an independent administrative feasibility requirement, the decision leaves the door open for defendants to make similar arguments through Rule 23’s enumerated requirements. In particular, the 9th Circuit concluded that “Rule 23’s enumerated criteria already address the interests that motivated the 3rd Circuit and, therefore, ... an independent administrative feasibility requirement is unnecessary.” Ultimately, the 9th Circuit’s ruling increases the likelihood that the Supreme Court will weigh in on this hot-button issue in class action jurisprudence.

Neal Ross Marder is a partner, **Ali R. Rabbani** is counsel, and **Zak Franklin** is an associate in the litigation practice at *Akin Gump Strauss Hauer & Feld LLP* in Los Angeles.