Briseño v. Henderson: new considerations for class action settlements today

On June 1, 2021, the Ninth Circuit issued its opinion in Briseño v. Henderson,[i] reversing the Central District of California's approval of a class action settlement involving consumer protection and false advertising claims relating to ConAgra's labelling of its cooking oil as "100% Natural." The Ninth Circuit confirmed that, as a matter of first impression, Federal Rule of Civil Procedure 23(e) (as amended in 2019) requires courts to evaluate attorneys' fees for possible collusion even in settlements that occur after class certification. This article explores the concerns expressed in Briseño with respect to the settlement in that case, and makes recommendations about what those concerns may mean for future class action settlements under the rubric of the new Rule 23(e) in the Ninth Circuit and possibly elsewhere.

The facts of Briseño

Briseño was a consumer class action filed in 2011 alleging that ConAgra's labeling of Wesson cooking oil as "100% Natural" violated the consumer protection and deceptive advertising laws of eleven states. The class was certified in 2014 despite multiple petitions for appellate review under Rule 23(f). In the summer of 2017 ConAgra removed the disputed label from its packaging. A settlement in principle was reached with the certified class in November 2018 ("the Settlement") and the Wesson Oil brand was ultimately sold to a third-party by ConAgra in February 2019.

The Settlement provided for a payment of $0.15 per container of Wesson Oil sold to households who submitted valid claim forms, with $10,000 to be distributed to and among claimants who submitted proof of more than thirty purchases, and an additional $575,000 in statutory damages for New York and Oregon class members.[ii] The Settlement also included injunctive relief that carried certain obligations for ConAgra if it ever reacquired the

Wesson Oil brand. Lastly, the Settlement provided that ConAgra would not contest Plaintiffs' request for $6.85 million in attorneys' fees—a so-called "clear sailing provision"—which would be paid separately from the settlement amount, and any reduction of which would revert back to ConAgra.

A single class member, M. Todd Henderson, objected to the Settlement under Rule 23(e). Mr. Henderson objected on the basis that, when the settlement and attorneys' fees were considered as a whole, the vast majority of the money would go to the Plaintiffs' attorneys rather than to the class. The district court nevertheless granted preliminary approval over Mr. Henderson's objection and his appeal to the Ninth Circuit followed.

The Ninth Circuit's concerns

The Briseño Panel pointed out several features of the Settlement that, in its view, presented a "squadron of red flags."[iii] The Ninth Circuit observed that defendants exploring whether to settle class actions are only concerned with their total exposure, and usually not the breakdown between relief to the class on the one hand and attorneys' fees and costs on the other.[iv] Against this backdrop, it measured the sufficiency of the Settlement from the standpoint of its "red flags."

Red flag 1: The majority of the total relief was paid to class counsel

The proportion of total relief received by class counsel has been a point of concern for the Ninth Circuit since its 2011 decision in In Re Bluetooth Headset Products Liability Litigation, in which the Ninth Circuit expressed concern that the trial court did not calculate a reasonable lodestar amount or compare the amount of requested attorneys' fees to the benefit to the class.[v] On this score, the Briseño Court pointed out that almost $7 million (or approximately 88%) of the total relief was awarded to class counsel while the Class only had submitted less than $420,000 in total claims.[vi]

Red flag 2: clear sailing provision for attorneys' fees and reversion to defendant

With respect to the attorneys' fees associated with the Settlement, the Ninth Circuit was concerned that ConAgra agreed not to contest an award of attorneys' fees up to $6.85 million. The Settlement further provided that in the event that the Court awarded any amount less than $6.85 million, the reduction would not revert to the class. This combination of agreements raised concerns for the Ninth Circuit because (1) there was no incentive on anyone's part to actually have the Court reduce the requested fee, and (2) the sheer magnitude of the fee relative to the Class' recovery suggested that class counsel advanced their financial interests over those of the Class.

As the Ninth Circuit in Bluetooth had put it ten years earlier, "[t]he clear sailing provision reveals the defendant's willingness to pay, but the kicker deprives the class of that full potential benefit if class counsel negotiates too much for its fees." Bluetooth, 654 F.3d at 949.

Red flag 3: questionable valuation of agreed-upon injunctive relief

The Settlement also required ConAgra to refrain from marketing Wesson Oil as "100% Natural."[vii] Plaintiffs submitted an expert declaration that valued this injunctive relief to consumers at $27 million.[viii] However, and critically, ConAgra had already sold the Wesson Oil brand by the time the Settlement was effectuated,[ix] and the

new owner of the Wesson Oil brand was not bound by the terms of the Settlement, including the injunctive relief. In any event, ConAgra had in fact stopped using the "100% Natural" label in 2017.[x] For these reasons the Ninth Circuit concluded that the injunctive relief at issue was "virtually worthless."[xi]

In light of all of these issues, the Ninth Circuit reversed the district court's approval of the Settlement and remanded the case back to the district court for further proceedings.

Possible solutions for class action settlements going forward

The Ninth Circuit's view of the value of the settlement in Briseño is expressed throughout the opinion, and sometimes with colorful prose. Nevertheless, there are a few lessons to be learned for practitioners navigating the process of settling a class action, particularly in cases involving large numbers of class members and small individual damages, which are often antitrust and consumer protection cases.

First, counsel for all parties negotiating a class settlement should clearly determine at the outset of the negotiations whether the settlement will include attorneys' fees and costs, or whether fees and costs will be resolved separately. This is often done in mediations, as many mediators prefer to start settlement negotiations by resolving the non-financial terms of settlement before discussing settlement numbers. This is good practice because it affords all parties the opportunity to think through the issues, including fee-related issues, that can cause problems when a class settlement is reviewed for adequacy by the court. Moreover, it allows the parties to clearly understand how any funds offered in settlement will be allocated before financial negotiations commence.

Second, if fees are to be determined separately from settlement funds available to the class, counsel should ensure that the discussion on fees is deferred until the amount of money available to the class is fully resolved. Despite the Ninth Circuit's concern expressed in Briseño, "clear sailing" provisions are not per se bars to settlement approval,[xii] particularly in the absence of a reversionary clause allowing the settling defendant to recoup any reduction.[xiii] Nevertheless, counsel should consider the added scrutiny that such provisions attract.

In some cases, a large fee award relative to the funds available to the class may be justified. Some of the factors that might support a relatively large fee award in a consumer class action include the complexity and duration of the litigation, the applicability of a fee-shifting statute such as that provided for in antitrust suits and many consumer protection state statutes, the novelty of the claims, whether the suit was preceded by a government enforcement agency, whether a number of class members opted out of the class case to settle on their own (thereby diminishing the settlement value of the case), and whether the litigation produced a tangible change in the defendant's conduct.

The Ninth Circuit has explicitly recognized this principle, not only in consumer protection cases, but in antitrust treble damage cases and others allowing for the recovery of attorneys' fees. For example, in Twin City Sportservice, Inc. v. Charles O. Finley & Co., 676 F.2d 1291 (9th Cir. 1982), which involved an antitrust class action, the Court explained:

Section 4 of the Clayton Act, 15 U.S.C. s 15, allows a successful treble damage plaintiff to recover reasonable attorney's fees as costs. An award of attorney's fees as part of the cost of a successful antitrust suit is mandatory . . . and the purpose of the attorney's fees provision is to insulate treble damage recovery from expenditures for legal fees, consistent with section 4's purpose to encourage private persons to undertake enforcement of antitrust laws. [xiv]

Third, counsel should be cautious if they elect to justify an award of fees based on their view of the monetary value of injunctive relief. It can be difficult to quantify the monetary value of injunctive relief and, frankly, if the relief has material value to the class, the terms of such relief should speak for themselves. In Briseño, Plaintiffs' counsel and their experts attempted to justify the utility of injunctive relief that was contingent upon a series of unlikely events—ConAgra's repurchase of the Wesson Oil brand and its further decision to market Wesson Oil as 100% Natural. Whether such relief was warranted at all is debatable, but class counsel magnified the Court's focus on that relief by attempting to assign a specific monetary value to the injunctive relief in order to justify the amount of attorneys' fees requested by counsel.

Specifically, as the Ninth Circuit noted, at class certification Plaintiffs' expert had raised the possibility of using statistical analysis to quantify the supposed price premium charged for the "100% Natural" label.[xv] When it came time to value the injunctive relief contemplated by the Settlement, Plaintiffs' expert concluded that the price premium—which was his proxy for the value of the injunctive relief—was worth $11.54 million per year.[xvi] After opining that the price premium could be determined using statistical analysis, however, the expert did not do so. In light of his prior representations, the Ninth Circuit roundly criticized the expert for failing to carry through on his promises, and expressly stressed that it believed the real value of the injunctive relief was effectively zero.

Conclusion

The Briseño opinion is a harsh rebuke of a class action settlement that was of questionable value to the Class. The point of a settlement is to resolve the uncertainty and continued expense of litigating. As Briseño illustrates, the diligence of counsel both during the settlement process and during the presentation of its results to the court can have a significant effect on achieving that goal expeditiously once the decision to explore a class action settlement has been made.

Footnotes

[i] 2021 WL 2197968 (9th Cir. Jun. 1, 2021) [hereinafter Briseño].

[ii] The Authors note that false advertising cases like this present a particularly difficult case for damages, as illustrated by the amount of monetary relief obtained for the Class as a result of the Settlement.

[iii] Briseño at *2.

[iv] Briseño at *7.

[v] 654 F.3d 935, 943 (9th Cir. 2011) [hereinafter Bluetooth].

[vi] Briseño at *4.

[vii] Briseño at *10.

[viii] Briseño at *3.

[ix] Briseño at *10.

[x] Briseño at *3.

[xi] Briseño at *10.

[xii] See In re Nat'l Football League Players Concussion Injury Litig., 821 F.3d 410 (3d Cir. 2016); In re Sw. Airlines Voucher Litig., 799 F.3d 701, 712 (7th Cir.2015); Gooch v. Life Inv'rs Ins. Co. of Am., 672 F.3d 402, 426 (6th Cir.2012); Bluetooth; Blessing v. Sirius XM Radio Inc., 507 Fed.Appx. 1, 4 (2d Cir.2012); Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518, 525 (1st Cir.1991).

[xiii] See In re Toys R Us-Delaware, Inc.--Fair & Accurate Credit Transactions Act (FACTA) Litig., 295 F.R.D. 438, 458 (C.D. Cal. 2014).

[xiv] Id. at 1312.

[xv] Briseño at *2.

[xvi] Briseño at *11.

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