

## Stage Set For Class Cert. Guidance In 9th Circ. Briseno Suit

By **Steven Trader**

Law360, New York (October 7, 2016, 5:16 PM EDT) -- The Ninth Circuit recently made clear its stance on allegedly deceptive "natural" labels in a case involving Dole Foods, but the court's imminent decision in a less known suit involving a unique damage model and class definition question could ultimately provide more important guidance for false advertising class actions moving forward, attorneys say.

With all eyes locked on *Brazil v. Dole Foods* and two other false labeling appeals currently pending in the Ninth Circuit, the dispute between Robert Briseno and ConAgra Foods Inc. over allegedly mislabeled "natural" oil products has flown quietly under the radar. But favorable decisions by a California federal judge on a novel damage model and class ascertainability have set the stage for a Ninth Circuit ruling in *Briseno* that could answer a few significant questions, experts say.

"There could be two very important things that come out of *Briseno*," Janine Pollack of Wolf Haldenstein Adler Freeman & Herz LLP said. "I'm not so sure people were focusing on it because there were so many other cases that seemed like they could also end up being the lead case, but as it turns out, luck of the draw, [*Jones v. ConAgra*] was delayed for other reasons, *Brazil* was nonprecedential, so that really puts *Briseno* in the hot seat."

What distinguishes *Briseno*, according to Pollack, is that the damages expert proposed a method for determining the allegedly mislabeled product's worth by combining a regression analysis with a conjoint study that supposes to isolate the price premium specifically attributable to what consumers think certain label statements mean — an approach never before taken in a consumer fraud suit.

While both a lower court and the Ninth Circuit **found** that *Brazil*'s expert hadn't adequately explained how the regression-only model would establish common proof of damages, *Briseno*'s model was enough to satisfy U.S. District Judge Margaret Morrow, who **certified** 11 consumer subclasses in February 2015.

It sets up a chance for the appellate court to get its first look at the combination damage model under the microscope of the U.S. Supreme Court's *Comcast v. Behrend* ruling, which mandates a damage model capable of identifying a particular harm that can be measured across an entire class, and Pollack expects the Ninth Circuit to take advantage.

"I get the sense that the Ninth Circuit wants to use *Briseno* more as precedent because the way *Brazil* came to the circuit — first the class was OK'd, then it was decertified ... it wasn't really the quintessential case to make as the forefront, leading case on how to do damages under *Comcast* in consumer cases," Pollack said. "They know full well that this is the first of its kind."

Tom Gilbertsen of Pierce Atwood LLP agreed that *Briseno*'s damage model will be a key issue, but said he has a hard time seeing the Ninth Circuit go along with a regression analysis that's admittedly incomplete, combined with a speculative consumer survey that doesn't accurately reflect the complexity of why customers buy things.

"The Supreme Court has made clear that plaintiffs need to prove each of the Rule 23 class

certification elements is present, and I don't think that an expert declaring, 'I think I'll be able to get the data to do this analysis,' I don't think that will cut it. That should not cut it," Gilbertsen said.

The other important result from *Briseno* could be a final say on whether or not the element of class member ascertainability is satisfied by clearly defining who might qualify for a particular class, which courts in the Ninth Circuit have been split on but Judge Morrow agreed was enough for certification.

Jason Sultzer of The Sultzer Law Group PC noted that ascertainability technically isn't even a Rule 23 requirement, nor is its purpose to immediately pinpoint every single class member, yet the Third Circuit and other courts have tried to make that a condition. He anticipated the Ninth Circuit to refrain from that logic and side with Judge Morrow.

"Class actions were designed for these types of cases, but if you're arguing what the defense is arguing, that means there would never be a class action and that doesn't make sense," Sultzer said. "I think Judge Morrow got it right, and I think that's ultimately where the Ninth Circuit will come out on this."

But as Amanda Groves of Winston & Strawn LLP pointed out, *Briseno* presents a scenario where every potential class member was supposedly exposed to the same "100 percent natural" label claim, which isn't the same issue as other cases where potential class members were exposed to different labels, which judges have been more reluctant to certify.

"The Ninth Circuit may well decide that the class was ascertainable in this case, but that doesn't mean it's ascertainable when you have labels that change over time or different representations class members are going to need to remember," Groves said.

What could be most interesting about the *Briseno* decision, though, is its aftermath. Numerous food label cases throughout the Ninth Circuit have been paused pending appellate decisions in *Brazil*, *Jones*, and *Kosta v. Del Monte*. Whether decisions in *Brazil* and *Briseno* would be enough to get those stays lifted remains to be seen, Groves said.

"If they do another unpublished decision [like *Brazil*] or decide they're only going to address some of the issues in a very narrow way, then maybe the courts will want to wait and see what happens with *Kosta* and *Jones*," said Groves.

"Maybe they just feel that the judge in *Briseno* didn't abuse her discretion and they don't need to write a lot on it, but you never know," Pollack added. "Maybe they'll surprise us."

--Additional reporting by Emily Field and Cara Bayles. Editing by Katherine Rautenberg.