9th Circ. Ruling Signals Scrutiny Of Class Settlement Fees

By **Jason Russell, Hillary Hamilton and Adam Lloyd** (September 15, 2021)

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Despite the playful tone of the Briseño v. Henderson decision issued by the U.S. Court of Appeals for the Ninth Circuit in June, class action litigators should take the case seriously when structuring class action settlements.

Amid a thicket of pop-culture references, the Briseño panel held that under the revised Federal Rule of Civil Procedure 23(e)(2), federal courts must heavily scrutinize any settlement made on behalf of a class — whether pre- or post-class certification — to ensure that counsel for the defendant and the class have not colluded on an unfair distribution of settlement funds between recovery for the class and the fees for its attorneys.[1]

Over a decade ago, in June 2011, the Briseño plaintiffs alleged that defendant ConAgra Foods Inc. misled consumers who wished to avoid consuming genetically modified organisms by placing a "100% Natural" label on its Wesson cooking oil brand, which allegedly contained GMO ingredients.[2]

Notwithstanding the fact that the parties had been litigating the plaintiffs' false advertising claims for nearly 10 years, the Ninth Circuit rejected the parties' settlement that was negotiated after class certification, on grounds raised by a single objector.[3] The panel took significant issue with the class counsel's fee award, and found that the settlement "reek[ed]" of collusion.[4]

The panel determined that the parties' settlement agreement and fee arrangement "raise[d] a squadron of red flags billowing in the wind and begg[ed] for further review," because (1) class counsel would receive disproportionately more money than the class; (2) the defendant agreed not to challenge class counsel's requested fee award (and any reduction in fees would revert to the defendant); and (3) the labeling-change injunctive relief that class counsel secured was "worthless," so it could not be used to justify class counsel's fee here.[5]

The panel grounded its analysis in the history and text of Rule 23(e)(2), which was revised in December 2018, and requires a court to ensure that a class settlement is fair, reasonable and adequate.[6]

Prior to the 2018 revision, however, Rule 23(e) did not provide guidance as to what was fair, reasonable or adequate. So the Ninth Circuit filled in the gaps by providing several factors for district courts to consider, including the strength of the plaintiffs' claims and the risk and expense of further litigation at the stage of the proceedings.[7]

The Ninth Circuit also was particularly wary of settlements reached on behalf of a class precertification — where it found that counsel may be most incentivized to maximize their own financial gain at the expense of the class members — and in 2011, provided an additional instruction for courts to watch out for what it called "subtle signs" that class

counsel was putting their own self-interest before the class.

These signs included: (1) counsel receiving a disproportionate distribution of the settlement; (2) parties negotiating a "clear sailing arrangement," under which the defendant agrees not to challenge a request for an agreed-upon attorney fee; and (3) an agreement containing a "kicker" or "reverter" clause, that returns unawarded fees to the defendant, rather than the class.[8] In the Ninth Circuit, these are commonly known as the Bluetooth factors.

Then, in 2018, Rule 23 was amended to set forth specific factors for courts to consider when determining whether a class settlement was adequate, including "the costs, risks, and delay of trial and appeal"; "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims"; and "the terms of any proposed award of attorney's fees, including timing of payment."[9]

The Briseño panel focused on this last factor, and held that the new Rule 23(e) "indicates that a court must examine whether the attorneys' fees arrangement shortchanges the class" for all class settlements. As a result, the panel found, district courts should apply the Bluetooth heightened scrutiny factors for both pre- and post-class certification settlements to "smoke out" potential collusion on attorney fee arrangements.[10]

Applying the Bluetooth factors to the Briseño class counsel's fee arrangement here, the panel concluded that the fee arrangement "features all three red flags of potential collusion."[11] First, the panel noted the "gross disparity in distribution of funds between class members and their class counsel raises an urgent red flag," as counsel was set to receive nearly $7 million in fees, while the class received less than $1 million.[12]

The panel found this disparity particularly problematic here because the parties knowingly structured a relatively common claims-made settlement, requiring class members to submit a claim to obtain a recovery, for a low-ticket item, which typically results in what the panel called "notoriously low" redemption rates. In this case, class members would recover 15 cents per unit of Wesson oil purchased during the class period.[13]

Second, ConAgra agreed not to challenge the fees for class counsel, and the panel held that "the very existence of a clear sailing provision increases the likelihood that class counsel will have bargained away something of value to the class."[14]

Third, the agreement provided that ConAgra was to receive any remaining funds if the district court reduced the agreed-upon attorney fees for class counsel, and the panel concluded that if a court determined the "full amount unreasonable, there is no plausible reason why the class should not benefit from the spillover of excessive fees."[15]

Significantly, the panel also held that the settlement's injunctive relief component — ConAgra's agreement to no longer market Wesson oil as "100% Natural" — could not be used to justify the class counsel's excessive fee.[16] The panel panned the injunctive relief as "virtually worthless," "illusory" and "meaningless," because ConAgra had already decided to stop using the "100% Natural" label two years before the settlement agreement was reached — for reasons it stated were unrelated to the litigation — and no longer even owned the Wesson oil brand.[17]

Although ConAgra's sale of the Wesson oil brand in Briseño clearly presents an uncommon circumstance, the panel made clear that going forward, courts must eliminate inflated valuations of injunctive relief "untethered to reality" that are used to justify excessive fee

awards for class counsel.[18]

Briseño's discussion of worthless injunctive relief will have significant repercussions for future settlement of many California federal class actions, as many companies often make labeling changes for business reasons before any complaints are even filed.

While the panel expressly stated that its decision did not mean that "courts have a duty to maximize the settlement fund for class members," and a "class does not need to receive much for a settlement to be fair when the class gives up very little," the practical effect of, and takeaway from, Briseño is that class counsel should expect significantly more resistance from defense counsel and courts to high attorney fee awards in class action settlements.[19]

This will especially impact low-value and/or labeling claims arising from a plaintiff's subjective beliefs of purported harm — particularly when a defendant has already decided to make a labeling change for business reasons. In such cases, the relief that counsel can secure for the class is likely to be limited, and Briseño plainly requires a commensurate fee award for class counsel.

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[1] Briseño v. Henderson, 998 F.3d 1014, 1018-19 (9th Cir. 2021).

[2] Id.

[3] Id.

[4] Id.

[5] Id.

[6] Id. at 1023.

[7] Id. (citing Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998) and Staton v. Boeing Co., 327 F.3d 938, 959 (9th Cir. 2003)).

[8] Id. (citing In re Bluetooth Headset Products Liability Litigation, 654 F.3d 935, 947 (9th Cir. 2011)).

[9] Fed. R. Civ. P. 23(e)(2)(C).

[10] Briseño, 998 F.3d at 1023-24.

[11] Id. at 1026.

[12] Id.

[13] Id.

[14] Id. at 1027.

[15] Id.

[16] Id. at 1028.

[17] Id.

[18] Id. at 1029.

[19] Id. at 1027-28.