



## DISTRICT COURT SLAPS DOWN SECOND ATTEMPT TO CERTIFY CLASS IN FOOD-LABELING ACTION

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In *Bruton v. Gerber Products Company*, U.S. District Judge Lucy H. Koh denied a consumer's motion for class certification in a food-labeling action on grounds that highlight the difficulties for plaintiffs in such cases. The plaintiff sought to certify classes seeking damages and injunctive relief based on allegedly inaccurate label statements on Gerber products. In an exacting decision, the district court found that class certification was inappropriate because Gerber had already corrected the label statements at issue and the plaintiff failed to propose an adequate theory of class-wide damages. The decision contains lessons for plaintiffs and defendants alike in pursuing such cases on a class basis.

### Background

The litigation began when Bruton filed a putative class action against Gerber in 2012. After Bruton's claims for violation of several California consumer protection statutes survived Gerber's motion to dismiss, Bruton moved to certify a damages class and an injunctive relief class under Rules 23(b)(2) and (b)(3) of the Federal Rules of Civil Procedure. The district court denied the plaintiff's motion and declined to certify either of the proposed classes on the ground that the plaintiff could not satisfy the ascertainability requirement. The district court eventually granted summary judgment for Gerber on the consumer protection claims.

Bruton appealed to the U.S. Court of Appeals for the Ninth Circuit. On appeal, the Ninth Circuit reversed the district court's denial of class certification in light of *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017), in which the Ninth Circuit declined to adopt a separate ascertainability requirement for class certification. The Ninth Circuit also reversed in part the district court's grant of summary judgment. Thus, the case was remanded to the district court to reconsider the plaintiff's motion for class certification with respect to her remaining claims for unfair competition and unjust enrichment.

### Plaintiff Lacked Standing for Injunctive Relief

On remand, the plaintiff again moved for class certification of an injunctive relief class under Rule 23(b)(2). Again, the district court denied plaintiff's motion. This time, Judge Koh found that a class could not be certified because the plaintiff lacked standing under Article III of the U.S. Constitution. The court concluded that because Gerber had ceased using the label statements challenged in Bruton's complaint, Bruton failed to make a requisite showing that she was subject to a "real and immediate threat of repeated injury" from the challenged label statements.

Judge Koh distinguished *Davidson v. Kimberly-Clark Corp.*, 873 F.3d 1103 (9th Cir. 2018), *amended* 2018 WL 2169784 (9th Cir. May 9, 2018), in which the Ninth Circuit held that a consumer may have standing to enjoin false advertising or labeling even though the consumer has since learned that the advertising was false at the

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time of the original purchase. According to the Ninth Circuit, an actual or imminent threat of future harm can exist if doubts remain regarding the accuracy of the product labeling. According to Judge Koh, *Davidson* was inapplicable because Gerber had ceased using the allegedly incorrect statements. Thus, Gerber's labeling was "no longer inaccurate" and there was "nothing left to enjoin." *Bruton*, 2018 WL 1009257, at \*6-7.

### **Plaintiff Failed to Establish an Adequate Damages Model under *Comcast***

Judge Koh likewise rejected the plaintiff's motion to certify a damages class under Rule 23(b)(3), finding that *Bruton* failed to present a classwide damages model that was "consistent with [her] liability case" as required by the Supreme Court's decision in *Comcast Corp. v. Behrend*. *Id.* at \*8 (quoting *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013) (internal quotation marks omitted)). The court analyzed each of the three models proposed by *Bruton*'s damages expert, concluding that none of them satisfied *Comcast*'s requirements.

**Full Refund Model.** First, the court rejected the plaintiff's "full refund" model, under which all purchasers of the product would simply receive a full refund of the purchase price paid. The court rejected this model because it improperly assumed that consumers received *no* benefit from purchasing the products. In the court's view, this "cannot be the case, as consumers received benefits in the form of calories, nutrition, vitamins, and minerals." *Id.* at \*9 (quoting *Brazil v. Dole Packaged Foods, LLC*, 2014 WL 2466559, at \*15 (N.D. Cal. 2014) (*Brazil I*)). Thus, the court flatly rejected this theory of class-wide recovery.

**Price Premium Model.** Second, the court rejected the plaintiff's "price premium" model. Under this model, the plaintiff's damages expert would compare the price of the Gerber products at issue to the price of comparable products that lacked the challenged statements in an effort to isolate the price difference attributable to the presence of the statements. *Bruton*, 2018 WL 1009257, at \*9.

The court rejected this model because the expert had shown no way of controlling for independent reasons that may account for a price difference between allegedly comparable products, such as brand recognition, loyalty, ingredients, or product quality. *Id.* (citing *Brazil I*, 2014 WL 2466559, at \*16). Thus, the model failed to meet *Comcast*'s requirement of tying damages solely to the alleged misconduct. *Bruton*, 2018 WL 1009257, at \*9.

**Regression Model.** Lastly, the court rejected the plaintiff's "regression" model, which would determine damages by comparing the sales of the products at issue before and after Gerber used the challenged labels, filtered through a regression analysis that would supposedly control for independent variables influencing Gerber's sales. *Bruton*, 2018 WL 1009257, at \*9. The court rejected the proposed regression model as inadequate under *Comcast* for a number of reasons.

Critically, the regression model lacked any "reliable means" for comparing products with and without the challenged labeling because, for various reasons, it was not necessarily possible to identify the specific label that appeared on a Gerber product even if the consumer remembered the date of purchase or the store where the product was purchased. The court also found that the plaintiff had not adequately explained how the model would control for independent variables such as advertising, brand recognition or loyalty, the prices of competing products, regional differences, consumers' income, and seasonality.

### **Takeaway**

Judge Koh's decision shows that even where food-labeling class actions can survive the pleadings stage, plaintiffs still face serious obstacles at the class-certification stage. While *Comcast* has not become a silver bullet in overcoming class certification based on individualized damages issues, the court's decision confirms that *Comcast* remains a powerful weapon for defendants in defending against class certification.