

THE
NATIONAL LAW REVIEW

Ninth Circuit Denies Review of Class Certification in Beer Labeling Brouhaha

Monday, April 15, 2019

In a 2-1 decision memorialized in a one-page order, a Ninth Circuit panel recently denied Kona Brewing's request for leave to appeal a grant of class certification to a consumer class claiming that the company's branding deceptively communicated the false message that Kona beer is brewed in Hawaii. [Broomfield v. Craft Brew Alliance, No. 18-80145 \(9th Cir. 2019\)](#).

Plaintiffs claimed that by giving Hawaiian names to its beers such as "Hanalei Island IPA" and "Kanaha Blonde Ale," and incorporating images of Hawaiian scenes on its beer bottle labeling, Kona Brewing communicated the false message that its beers were brewed in Hawaii when they actually are brewed in New Hampshire and Tennessee.

In its petition for permission to appeal the class certification order, Kona argued that the District Court rubber stamped plaintiffs' argument that the class of purchasers all gleaned the same material, misleading message from the imagery on the packaging, even though the issue of whether class-wide liability can be predicated solely upon imagery is one of first impression in the Ninth Circuit. Kona also argued that the District Court's evaluation of plaintiffs' proposed conjoint analysis for class-wide damages was insufficiently probing, and that the District Court failed to appreciate deficiencies in plaintiffs' damages model.

The panel majority denied Kona's petition, issuing a one-sentence order citing without further explanation to a previous Ninth Circuit decision, *Chamberlan v. Ford Motor Co.*, 402 F.3d 952 (9th Cir. 2005). Under *Chamberlan*, the Ninth Circuit cautioned that permitting an interlocutory appeal under Rule 23(f) should be a "rare occurrence," and is only justified when: (1) there would be a death knell situation for either party absent review – that is, where the certification decision would effectively end the litigation by making it prohibitive for one of the parties to continue; (2) the petition presents unsettled and fundamental issues of law related to class actions; or (3) there is a manifest error in the district court's certification decision.

Judge Gould, in dissent, opined that at least two of the *Chamberlan* criteria were present. He wrote that "certification may cause the defendant unduly to feel pressed to reach a settlement without regard to merits because of the size of the California market for beer." He also wrote that certification could resolve the issues raised by appellant, which he viewed as important unsettled legal questions.

The decision underscores the difficulties defendants of class action lawsuits face if they are unsuccessful in resisting class certification at the district court level. As Judge Gould noted, class certification shifts the dynamics of a case, pressuring defendants to settle rather than endure costly litigation in order to achieve end-of-case review. In this sense, a grant of class certification may be dispositive of a case despite being unconnected to the merits of the claims.

Ariella Muller also contributed to this article.

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