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Beating Class Certification in the Ninth Circuit on the Damages/Restitution Issue

by Jay Bogan

The Ninth Circuit has emphasized time and again that the need for individualized inquiries on the issue of damages does not itself defeat class certification. But, in light of the U.S. Supreme Court's decision in *Comcast Corp. v. Behrend*, the Ninth Circuit has made it clear – in two recent "not for publication" decisions – that this principle only applies when there is a common methodology for calculating damages. Where the class representative does not or cannot show that damages can be measured on a class-wide basis, class certification should be denied.

In *Brazil v. Dole Packaged Foods, LLC*, the plaintiff alleged that Dole deceptively advertised its fruit products as "All Natural Fruit," despite the fact that the products contained synthetic citric and absorbic acid. The plaintiff sought a full refund on behalf of himself and the class. But, according to the Ninth Circuit, the plaintiff could only seek a full refund where the product purchased had no value whatsoever. Because the plaintiff could not prove that Dole's fruit products were valueless, he could only recover the "price premium" – the difference between the price a consumer paid and the actual value of the fruit purchased. Because the plaintiff did not explain how the price premium could be calculated on a class-wide basis, the Ninth Circuit affirmed the district court's decertification of the class.

Brazil v. Dole Packaged Foods, LLC, No. 14-17480, 2016 WL 5539863 (9th Cir. Sep. 30, 2016)

In *Doyle v. Chrysler Group, LLC*, the plaintiff sued Chrysler for failure to disclose a defect in its window regulator replacements. The plaintiff bought a replacement regulator for $100. Even though his replacement regulator never failed, he sought a partial reimbursement of the purchase price, based on the undisclosed defect (in other words, the $100 price tag was too high because the replacement regulator was prone to failure). Plaintiff, however, did not offer a damages model for determining what percentage of the purchase price the reimbursement should be. Because the plaintiff did not show that "partial reimbursement damages" could be measured on a class-wide basis, the predominance requirement was not satisfied and the district court abused its discretion in certifying a class.

Doyle v. Chrysler Group, LLC, No. 15-55107, 2016 WL 6156062 (9th Cir. Oct. 24, 2016)

Takeaway: *Brazil* and *Doyle* demonstrate the need to contest class certification on the damages/restitution issue, especially where a class plaintiff relies on a partial refund or reimbursement damages theory.