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Supreme Court takes a pass on class action ascertainability

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(Reuters) - After a summer of soap operatic twists and turns, the U.S. Supreme Court has shut down the class action ascertainability show: On Tuesday, the justices denied Conagra's petition to review a decision by the 9th U.S. Circuit Court of Appeals that certified a class of Wesson Oil purchasers with false advertising claims. Conagra, as you know, had asked the Supreme Court to resolve a split among the federal circuits on the standard for identifying absent class members in order to be certified. The 3rd Circuit demands that plaintiffs offer an administratively feasible way to determine who's in the class. The 7th and 9th Circuits have explicitly rejected the 3rd Circuit standard. Several other circuits fall somewhere in between.

Over the summer, after Conagra and the Wesson Oil purchasers briefed Conagra's petition for certiorari, the 2nd, 3rd and 6th Circuits all tweaked their ascertainability tests. In supplemental briefs filed after the circuit courts' summer rulings, Conagra's Supreme Court lawyers from Jones Day argued the new decisions reflected turmoil in the lower courts that could only be resolved by the justices' guidance.

The Wesson Oil class, represented by New York University law professor Samuel Issacharoff and Lewis & Clark law prof Robert Klonoff, said the summer rulings showed an emerging consensus among the lower courts. Especially after the 3rd Circuit seemed to soften its stance on ascertainability in a decision in August, the Wesson class argued, the Supreme Court should let the issue percolate below.

Obviously, the justices agreed with the class, extending NYU prof Issacharoff's impressive streak of fending off Supreme Court review of complicated class certification issues. (One prominent plaintiffs' lawyer called him a "Jedi master" in an email to me after the court denied Conagra's petition.) Among other wins, Issacharoff previously convinced the Supreme Court to sidestep the infamous moldy washer cases and BP's appeal of its own Deepwater Horizon class settlement.

I've been touting the Conagra case as an early test of the post-Scalia Supreme Court's appetite for big class action issues. Ascertainability presented a legitimate circuit split, since both the 7th and 9th Circuits explicitly rejected the 3rd Circuit's test. And class action defendants were eager for the justices to grant review in order to rein in consumer class actions. I don't want to over-interpret the denial of certiorari but for the business lobby, this was a disappointment.

Issacharoff and Conagra counsel Shay Dvoretzky of Jones Day declined email requests for comment.

--- **Index References** ---

Company: CONAGRA BRANDS INC; JONES DAY LP; LEWIS AND CLARK BANK

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