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The Great Class Action Ascertainability Debate

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In recent years, courts have divided sharply over whether or not Rule 23 of the Federal Rules of Civil Procedure creates an implicit requirement that a class must be ascertainable in order to be certified. This article addresses the meaning of ascertainability, the circuit split over whether and to what extent it is required, and implications of the ascertainability circuit split for class action litigants.

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What is Ascertainability? Assessing the Growing Circuit Split

In addition to the Rule 23(a) and 23(b) requirements for class certification, most circuit courts have recognized another implicit requirement that must be met before a Rule 23(b)(3) class can be certified: ascertainability. But what ascertainability means and whether and when that requirement can be satisfied has been hotly debated in the courts.

Two definitions of (or tests for) ascertainability have emerged: heightened ascertainability and lesser ascertainability. Courts in the First, Third, Fourth and Eleventh Circuits have adopted the heightened ascertainability requirement. In these circuits, a class cannot be certified unless the class is sufficiently definite and plaintiffs demonstrate an administratively feasible way for the court to determine whether a particular individual is a member of the class. "If class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials,' then a class action is inappropriate." Marcus v. BMW of North America LLC, 687 F.3d 583, 593 (3d Cir. 2012). On the other hand, the Second[1], Sixth, Seventh, Eighth and Ninth Circuits have rejected the heightened ascertainability requirement, finding that there is no independent "administrative feasibility" prerequisite to class certification.

The Third Circuit's Heightened Ascertainability Requirement

The leading case in favor of imposing the heightened ascertainability standard is Carrera v. Bayer Corp., 727 F.3d 300 (3d Cir. 2013). Carrera was a putative class action against a weight loss supplement provider alleging that the defendants deceptively advertised the product as enhancing metabolism. The weight loss supplement provider did not sell its product directly to consumers but instead sold the product in retail stores such as pharmacies. The plaintiffs advanced two ways to ascertain the class: (1)

by retailer records of online sales and sales made with loyalty or rewards cards; and (2) by affidavits from class members attesting that they bought the product and stating the amount they paid. While the district court granted class certification, the Third Circuit vacated the order on ascertainability grounds, finding that these two methods in this case were insufficient because (1) there was no evidence that the retailers had such records, and (2) the affidavits were not subject to a reliable screening methodology to identify fraudulent claims. In so doing, the Carrera court stated that a class cannot be certified unless there is an administratively feasible method of determining whether individuals are members of the class.

In Carrera, the Third Circuit provided a number of rationales for the precertification heightened ascertainability requirement. First, a precertification administrative feasibility requirement eliminates significant administrative burdens — such as the need to conduct mini-trials to identify proper class members — that are inconsistent with the efficiencies that are supposed to be achieved in class actions. Second, the administrative feasibility requirement is necessary to provide proper notice to absent class members and protect legitimate claimants from dilution of their recovery that would result from fraudulent claims. Third, the administrative feasibility requirement is necessary to protect the due process rights of defendants to raise individual defenses and challenges to claims, including the opportunity to challenge whether class members are truly part of the proposed class.

Recent Decisions Rejecting the Heightened Ascertainability Requirement

A number of circuits, including the Second, Sixth, Seventh, Eighth and Ninth Circuits, have rejected the heightened precertification ascertainability requirement. Instead, in these circuits, any ascertainability requirement is met so long as a class is defined using objective criteria that establish a class membership with definite boundaries.

One of the most recent cases rejecting the heightened ascertainability requirement came from the Ninth Circuit in Briseno v. ConAgra Foods Inc., 844 F.3d 1121 (9th Cir. 2017). Briseno was a putative class action against a packaged food company alleging that a consumer product was mislabeled. The proposed classes included consumers in 11 states that purchased cooking oils labeled “100% natural.” The defendant moved to dismiss the class claims on ascertainability grounds, arguing that there was no administratively feasible way to reliably identify members of the proposed classes because “consumers do not generally save grocery receipts and are unlikely to remember details about individual purchases of a low-cost product like cooking oil.”

The Ninth Circuit rejected this argument, concluding that “a separate administrative feasibility prerequisite to class certification is not compatible with the language of Rule 23.” The court relied heavily on the absence of any language in the text of Rule 23 imposing an administrative feasibility requirement. It explained: “The language of Rule 23 does not impose a freestanding administrative feasibility prerequisite to class certification. Mindful of the Supreme Court’s guidance, we decline to interpose an additional hurdle into the class certification process delineated in the enacted Rule.”

In reaching this decision, the Briseno court rejected each of the rationales set forth by the Third Circuit in support of such a rule. First, it rejected the administrative efficiency rationale, noting that the manageability requirement in Rule 23 already addresses administrative concerns in a more balanced way. Second, it rejected the concern regarding providing reliable individual notice to absent class members, explaining that all that is required is the best notice practicable under the circumstances, not actual notice. Third, it dismissed the concerns regarding the submission of fraudulent claims, finding it to not be a substantial concern given the low response rates to class settlements. Finally, the Briseno court rejected the Third Circuit's due process rationale, finding that defendants can raise individual challenges and defenses to claims of named class members immediately, and can challenge those of absent class members if and when they file claims. The Briseno court found that these opportunities to challenge the plaintiffs' claims were sufficient to protect defendants' due process rights, noting that while "ConAgra may prefer to terminate this litigation in one fell swoop at class certification rather than later challenging each individual class member's claim to recovery, [] there is no due process right to a 'cost-effective procedure for challenging every individual claim to class membership.'"

A panel in the Second Circuit also recently rejected the heightened ascertainability requirement in In re Petrobras Securities Litigation, 862 F.3d 250 (2d Cir. July 2017). This decision was a surprise to many observers, because the Second Circuit previously embraced Carrera in Brecher v. Republic of Argentina, 806 F.3d 22 (2d Cir. 2015) as well as a more recent opinion following Brecher, Leyse v. Lifetime Entertainment Services LLC, 2017 U.S. App. LEXIS 2607 (2d Cir. Feb. 15, 2017).

The defendants in Petrobras have petitioned the Second Circuit for en banc review in light of these apparently inconsistent positions. Before July of this year, the Second Circuit was generally considered to be on the Third Circuit's side of the circuit split. Class action lawyers will be closely following the Second Circuit's response to the petition for en banc review, which may be a precursor to review by the U.S. Supreme Court.

Conclusion

These different ascertainability standards have significant consequences for class certification. For example, consider a hypothetical class action on behalf of consumers that purchased a mislabeled product. Under the heightened ascertainability test, the class may not be ascertainable because the consumers could not reliably identify themselves as having bought the mislabeled version of the product. However, under the less restrictive ascertainability test, the class may be considered ascertainable because it is defined by objective criteria. In the First, Third, Fourth and Eleventh Circuits, defendants may be able to defeat class certification in such a case on ascertainability grounds. In the Second, Sixth, Seventh, Eighth and Ninth Circuits, the class might be certified, and the defendant would have to litigate whether putative class members are properly members of the class on an individual basis after certification. Given the economic realities of class litigation, litigating the proper inclusion of individual putative class members after class certification could prove cost-prohibitive for defendants in most cases. As such, defendants in that position may consider settlement rather than mount a challenge to the class membership of individual class members.

The Ninth Circuit's opinion in Briseno and recent opinions in the Eighth and Second Circuits have deepened an already significant circuit split on the issue of ascertainability. Given the Ninth Circuit's forceful rejection of the legal and policy rationales put forward by the Third Circuit, this issue is now ripe for Supreme Court review. In the interim, favorable decisions in the Second and Ninth Circuits — two of the most popular circuits in which to bring class claims — will be seen as a boon to plaintiffs. Class counsel should keep these differences in mind as they strategize where to bring and defend class claims.

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[1] The Second Circuit recently rejected the administrative feasibility requirement in In re Petrobras Sec. Litig., 862 F.3d 250 (2d Cir. July 2017). The decision distinguished two prior circuit opinions that had embraced this standard, and is now the subject of a petition for en banc review.
