

CORPORATE LITIGATION:

THE CLASS ACTION ASCERTAINABILITY REQUIREMENT

JOSEPH M. MCLAUGHLIN AND SHANNON K. MCGOVERN*

SIMPSON THACHER & BARTLETT LLP

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May a damages class be certified if the proponent of certification is unable to show a reliable, administratively feasible way to identify putative class members? Federal circuit courts continue to answer this question in varying ways, with the Eleventh Circuit last week contributing to a deepening division of federal authority on what is required of a proposed class representative in order to demonstrate the existence of an ascertainable Rule 23(b)(3) class. In *Cherry v. Dometic*, 2021 WL 346121 (11th Cir. Feb. 2, 2021), the court departed from unpublished decisions from other Eleventh Circuit panels and emphatically declined to adopt a requirement imposed by three circuits that plaintiffs show the existence of a reliable and administratively feasible mechanism to identify absent class members as a precondition to class certification. The role of class ascertainability and whether identification of putative class members is administratively feasible present fundamental questions that recur across a range of class actions, especially consumer and securities litigations.

Background

Although Rule 23 does not expressly impose an ascertainability requirement, in order to bridge the “wide gap” between a plaintiff’s claim and “the existence of a class of persons who ha[s] suffered the same injury as the individual,” courts have required plaintiffs to demonstrate the existence of an aggrieved class. A district court cannot determine whether a proposed class satisfies the Rule 23 requirements without a way to identify absent class members. For example, a court cannot determine under Rule 23(a) whether a class is “so numerous that joinder of all members is impracticable,” unless it can first accurately estimate how many members are in the class. Nor can a court determine whether there are “questions of law or fact common to the class,” unless it first determines that the class members are alleged to have suffered the same injury. Accordingly, courts have recognized that an implicit requirement of Rule 23 and due process is that a Rule 23(b)(3) class must be presently ascertainable based on objective criteria that do not require the court to delve into the merits of the claims. There is agreement among courts that no ascertainability requirement applies to class actions seeking only injunctive relief under Rule 23(b)(2); the unitary nature of the remedy available under Rule 23(b)(2), the lack of need to identify class members in order to craft an enforceable remedy focused on the defendant’s conduct, and the absence of a notice and opt-out right make the identities of individual class members less important than in the context of a (b)(3) class.

The requirement that a Rule 23(b)(3) class be ascertainable by reference to objective criteria is rooted in the underlying purposes of the class action device and the dictates of due process. The class action rules are intended to promote judicial efficiency. An ill-defined class can result in an enormous waste of judicial resources. Class members need to be able to determine with certainty from a class notice whether they are in the

**Joseph M. McLaughlin* is a Partner and *Shannon K. McGovern* is an Associate at Simpson Thacher & Bartlett LLP.

class, so that they can determine whether to object to a proposed class-wide resolution or opt out of the class. If the (b)(3) class definition is amorphous, persons may not recognize that they are in the class, and thus may be deprived of the opportunity to object or opt out. This may call into question the extent to which the court's rulings and any jury determination will be binding on the parties. Allowing overbroad participation also risks reducing the recovery available to actual class members with valid claims. And unclear or vague class definitions deprive defendants of proper notice of the nature and scope of their exposure to class claims, cast doubt on the proper preclusive effect of a judgment entered in the class action and undercut the efficiencies integral to proper use of the class action mechanism.

Two competing approaches to ascertainability have emerged in the circuits. The Third Circuit, joined by the First and Fourth, requires a heightened ascertainability showing before a class is certified: (1) the class must be defined with reference to objective criteria; and (2) a reliable and administratively feasible mechanism must exist for determining whether putative class members fall within the class definition and thus are bound by the judgment in the case. *Hayes v. Wal-Mart Stores*, 725 F.3d 349, 355 (3d Cir. 2013); see *In re Nexium Antitrust Litig.*, 777 F.3d 9, 19 (1st Cir. 2015); *EQT Production Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014). The identification methods proposed by the plaintiff must be reliable because “[f]orcing [a defendant] to accept as true absent persons’ declarations that they are members of the class, without further indicia of reliability, would have serious due process implications.” *Marcus v. BMW of N. Am.*, 687 F.3d 583, 594 (3d Cir. 2012). And class member identification must be administratively feasible because otherwise the efficiencies of class adjudication are lost—“[i]f class members are impossible to identify without extensive and individualized fact-finding or ‘minitrials,’ then a class action is inappropriate.” *Id.* at 593.

Particularly in the context of claims involving low-cost consumer goods (where class members are unlikely to retain receipts and financial incentives to falsify are low), and where a common alleged misrepresentation is contained on the labeling, some courts have concluded that a class is ascertainable if post-certification class members can self-identify in uncorroborated sworn statements that they purchased the relevant product. See *Langan v. Johnson & Johnson Consumer Cos.*, 897 F.3d 88, 91 n.2 (2d Cir. 2018); *Briseno v. ConAgra Foods*, 844 F.3d 1121, 1131-31 (9th Cir. 2017). This approach raises due process and Seventh Amendment concerns, as it ordinarily will require defendants to take putative class members’ statements at their word with no opportunity for cross-examination, see *Allison v. Citgo Petroleum*, 151 F.3d 402, 423 (5th Cir. 1998) (“Once the right to a jury trial attaches to a claim ..., it extends to all factual issues necessary to resolving that claim.”), and also risks uninjured or fraudulent claimant participation in any recovery, to the detriment of legitimate class members.

The Second, Sixth, Seventh, Eighth, Ninth and (as described below) Eleventh Circuits hold that Rule 23 does not include an independent administrative feasibility requirement and instead requires only that a class be defined using objective criteria that establish a membership with definite boundaries. These courts reject “administrative feasibility” and “no-self-identification through unverifiable affidavits” aspects of the Third Circuit’s approach as inconsistent with the plain language of Rule 23 and imposing unwarranted restrictions against small value class actions (where claimants are less likely to retain transaction documentation). In these courts, a class is sufficiently ascertainable if the class definition is based on objective criteria without regard to the feasibility of applying those criteria.

‘Dometic’

Prior to *Dometic* last week, the Eleventh Circuit in non-precedential opinions had applied the Third Circuit’s heightened ascertainability analysis. In *Karhu v. Vital Pharmaceuticals*, for example, the plaintiff alleged that he had purchased a dietary supplement in reliance on defendant’s false advertising. 2015 WL 3560722 (11th Cir. June 9, 2015) (unpublished). The court affirmed a district court ruling that the proposed class was not ascertainable: “A plaintiff cannot establish ascertainability simply by asserting that class members can be identified using the defendant’s records; the plaintiff must also establish that the records are in fact useful for identification purposes, and that identification will be administratively feasible.”

In *Dometic*, plaintiff sought to certify nine subclasses consisting of all owners of 21 different models of defendant's gas absorption refrigerators across two decades. Gas absorption refrigerators can operate for extended periods of time without access to electricity, making them well-suited for use in recreational vehicles. In 2006 and 2008, Dometic initiated voluntary recalls of certain refrigerators to address a remote risk of a fire. Dometic provided a safety remedy intended to prevent any potential ignition from spreading outside the burner housing and posing a safety hazard, a remedy plaintiff alleged was inadequate. The district court denied class certification on the ground that Plaintiffs had not established any administratively feasible method for ascertaining class membership. According to the district court, plaintiffs had not proffered "any evidence that Dometic's records, including Dometic's recall efforts, would be useful to identify class members," and it rejected plaintiffs' suggestion of class member self-identification through affidavits because it did "not provide[] the Court with any proposals demonstrating how self-identification would work" The court then dismissed the action because, in its view, the class certification denial divested it of subject-matter jurisdiction under the Class Action Fairness Act.

The Eleventh Circuit reversed the class certification denial and reinstated the action. After canvassing the circuit split over the proper role of administrative feasibility on class certification motions, the agreed with all the circuits that "ascertainability—at least as traditionally understood—is an implied prerequisite to the requirements of Rule 23(a)" because "[w]ithout an adequate class definition, a district court would be unable to evaluate whether a proposed class satisfies Rule 23(a)" requirements such as numerosity and the existence of questions of law or fact common to the class. The court concluded, however, that "[a]dministrative feasibility is not an inherent aspect of ascertainability" because "membership can be capable of determination without being capable of *convenient* determination." Examining the language of Rule 23(a), the court determined that a requirement of administrative feasibility does not follow from any provision of the Rule: "neither foreknowledge of a method of identification nor confirmation of its manageability says anything about the qualifications of the putative class representatives, the practicability of joinder of all members, or the existence of common questions of law or fact." The court acknowledged that the manageability criterion of Rule 23(b)(3) makes administrative feasibility relevant to classes certified under that Rule, and that "difficulty in identifying class members is a difficulty in managing a class action." But it emphasized that "administrative difficulties—whether in class-member identification or otherwise—do not alone doom a motion for certification," and underscored the point by reiterating that such difficulties "rarely, if ever, [are themselves] sufficient to prevent certification," and again that "[a]dministrative feasibility alone will rarely, if ever, be dispositive."

Conclusion

The circuit-dividing question whether Rule 23 and due process require plaintiffs to prove that absent class members can be ascertained in an administratively feasible manner is ripe for Supreme Court resolution. Three circuits have held that Rule 23 requires proponents of class certification to show that class membership can be ascertained through administratively feasible means, while six circuits have held it does not. The requirement that class membership be ascertainable by administratively feasible means promotes the efficiency interests that underlie the class device while protecting due process rights of putative class members and defendants. Leaving the basic question of who is and who is not part of the class undetermined until after class certification raises serious due process concerns for both plaintiffs and defendants. It may result in a failure to give proper notice to potential class members because any notice will necessarily be either over-inclusive or under-inclusive—possibly both. Defendants will be unable to estimate the scope of the class with reasonable accuracy, greatly complicating their evaluation of settlement. Nor can defendants reliably predict the class of persons who will bound by the preclusive effect of a judgment entered in the class action.