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Ninth Circuit Rejects Ascertainability as a Requirement for Class Certification Under Rule 23

by Joe Reynolds

A potent weapon for defending against class actions is the requirement that class members be "ascertainable." Circuit courts phrase this requirement differently, but at bottom, it is two-fold: (1) the class must be objectively defined and (2) the court must be able to identify class members in an administratively feasible way. *See, e.g.*, *Brecher v. Republic of Argentina*, 806 F.3d 22, 24 (2d Cir. 2015); *Karhu v. Vital Pharm., Inc.*, 621 F. App'x 945, 947-48 (11th Cir. 2015); *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014); *Carrera v. Bayer Corp.*, 727 F.3d 300, 306 (3d Cir. 2013).

The ascertainability requirement has been particularly important in consumer class actions. Where a class representative attempts to define a class based solely on the purchase of a low-cost product—such as a diet supplement (*Carrera* and *Karhu*)—a defendant can readily cry foul. How can the defendant be sure that absent class members actually purchased the product? Consumers typically don't keep grocery receipts and are unlikely to remember the details about an otherwise routine purchase of a low-cost product. While members of a consumer class could submit affidavits swearing that they purchased the product at issue, this is viewed as an administratively *in*feasible way to determine class membership. Because a defendant has the right to challenge each claimant's class membership, this would devolve into a "series of mini-trials just to evaluate the threshold issue of which [persons] are class members." *Karhu*, 621 F. App'x at 949; *see also Carrera*, 727 F.3d at 307 ("A plaintiff does not satisfy the ascertainability requirement if individualized fact-finding or mini-trials will be required to prove class membership.").

This is exactly what ConAgra argued in *Briseno v. ConAgra Foods, Inc.*, No. 15-55727, 2017 WL 24618 (9th Cir. Jan. 3, 2017). Plaintiffs essentially sought to define their class as all persons who purchased Wesson-brand cooking oils labeled "100% Natural"—a label Plaintiffs claim is false or misleading because the product contains bioengineered ingredients. ConAgra, which markets and sells the product, argued that the district court erred by not requiring Plaintiffs to proffer a reliable way to identify class members. Again, "consumers do not generally save grocery receipts and are unlikely to remember details about individual purchases of a low-cost product like cooking oil." *Id.* at *3. The Ninth Circuit readily dismissed ConAgra's argument, refusing to even use the term "ascertainability." *Id.* at *2 n.3. Instead, the Ninth Circuit focused only on the second portion of the ascertainability requirement: whether class representatives must demonstrate an administratively feasible way to identify class members. *Id.* at *3 n.4. After employing the rules of statutory construction, the Ninth Circuit held that "the language of Rule 23 does not impose a freestanding administrative feasibility prerequisite to class

certification." *Id.* at *4.

After its interpretation of Rule 23, the Ninth Circuit spent the remainder of its opinion reviewing and rejecting the reasons the Third Circuit has proffered for requiring that class members be identified in an administratively feasible manner. In doing so, the Ninth Circuit joined the likes of the Sixth, Seventh, and Eighth Circuits, which have all criticized the Third Circuit's reasoning for such a requirement. *See, e.g.*, *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 996-97 (8th Cir. 2016); *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 657-58 (7th Cir. 2015); *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 525 (6th Cir. 2015). The Seventh and Eighth Circuits in particular have characterized the Third Circuit's approach as a "heightened" ascertainability requirement. *Sandusky*, 821 F.3d at 996; *Mullins*, 795 F.3d at 661-62.

At bottom, the Ninth Circuit reasoned that the factors enumerated in Rule 23 "already address" the policy concerns underlying any "separate administrative feasibility requirement." 2017 WL 24618, at *1. The Ninth Circuit leaned heavily on one factor in particular: Rule 23(b)(3)(D), "the likely difficulties in managing a class action." This is one of the four factors courts should consider in determining whether a class action is the superior vehicle for adjudicating the controversy. By invoking the superiority requirement—which entails a "comparative assessment of the costs and benefits of class adjudication, including the availability of 'other methods' for resolving the controversy"—the Ninth Circuit appears to be instructing courts to assess any potential administrative burdens alongside and compared to any potential benefits of using the class action vehicle. 2017 WL 24618, at *6.

This may be the upside of the opinion. The Ninth Circuit clearly had the low-value consumer class action in mind, noting there is no "realistic alternative to class treatment" for a class action involving "inexpensive consumer goods." *Id.* Therefore, the Ninth Circuit might have less tolerance for administrative burdens related to identifying class members outside of thelow-value consumer class action context. Moving forward, a defendant should (1) consider framing arguments regarding these administrative burdens under the superiority requirement and (2) pay close attention to how other factors used to assess superiority might impact a court's tolerance of these burdens.

Takeaway: The Ninth Circuit joins the Sixth, Seventh, and Eighth Circuits in disposing of the "heightened" ascertainability requirement. If a defendant must defend a class action in the Ninth Circuit, this is all the more reason to consider early defenses such as personal jurisdiction. But to the extent these defenses are unavailable, a defendant must be careful to frame an argument based upon potential administrative burdens in such a way that the argument will be recognized by the courts in the Ninth Circuit.