

## CLASS ACTION

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## TWO RECENT OPINIONS REFLECT IMPORTANT DEVELOPMENTS IN HEIGHTENED ASCERTAINABILITY FOR CLASS CERTIFICATION

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“Ascertainability”—that is, whether class members can be ascertained with administrative efficiency—continues to develop as a significant issue in class certification. Two recent opinions, *Brecher v. Republic of Argentina*, No. 14-4385, 2015 U.S. App. LEXIS 16493 (2d Cir. Sept. 16, 2015), in which the Second Circuit adopted ascertainability as a separate class-certification requirement, and *In re Processed Egg Products Antitrust Litigation*, No. 08-md-2002, 2015 U.S. Dist. LEXIS 124799 (E.D. Pa. Sept. 18, 2015), in which the court applied what has been called “heightened ascertainability” within the Third Circuit, demonstrate how the developing law on ascertainability can impact a class certification outcome. Ascertainability, though, is not necessarily developing uniformly or consistently as a distinct class certification requirement. Significantly, the Seventh Circuit has expressly rejected the concept. It has even come under criticism from judges within the Third Circuit. For practitioners, it is therefore critical to know the law of the circuit in which you are litigating and to continue to closely monitor developments in ascertainability.

*Brecher*, from the Second Circuit, involved one of a series of class actions by holders of defaulted Argentine bonds. The district court had certified a class to include all holders of beneficial interests in the relevant bonds without limitation as to the

time held. (Previously, the Second Circuit had approved a class that incorporated a time limitation). Argentina appealed. In reversing and remanding, the Second Circuit formally adopted ascertainability as a separate class-certification issue. Using language essentially identical to that earlier adopted by the Third Circuit, the Second Circuit held that a class is sufficiently ascertainable when it is defined by objective criteria that are administratively feasible, such that determining membership would not require mini-trials.

Under the newly-adopted ascertainability requirement, the class certified by the district court failed. The class definition incorporated objective criteria, namely owning a beneficial interest in certain bonds. Nonetheless, the class failed because it was too difficult to determine who met the criteria. According to the Second Circuit, the secondary market for Argentine bonds remains active, and the bonds do not have a unique number. So, the court reasoned, it would be nearly impossible to ultimately determine who holds bonds that were opted into or out of the class by previous owners, especially if those bonds were subsequently co-mingled.

In *In re Processed Egg Products*, the district court, following controlling Third Circuit precedent, applied heightened ascertainability in declining to certify a consumer class action. Three categories of

plaintiffs alleged that the nation's major egg producers conspired to increase the price of eggs. Indirect purchasers, *i.e.*, those who bought eggs at a supermarket but not directly from the producers, comprised one category of plaintiffs.

As in *Brecher*, the putative class of indirect purchasers contained objective criteria, specifically, those who purchased certain types of eggs within a given time period. The class, however, presented an ascertainability problem. Those who bought eggs directly from the producers, typically in very large quantities, could readily demonstrate membership in the direct-purchaser class because the purchasers and the sellers maintained records. But how would someone who purchased one carton of a certain type of eggs from a supermarket several years earlier prove that they in fact made that purchase? In such a circumstance, the buyer or the seller is highly unlikely to have a receipt or other evidence of the sale.

Counsel for the indirect purchasers proposed a solution: potential class members would submit affidavits swearing that they fell within the class definition. Moreover, because the Third Circuit had earlier held that ascertainability requires more than a putative class member's "say so" that he or she is a member of the class, the plaintiffs proposed that a claims administrator would screen and attempt to verify the affidavits.

The plaintiffs' proposed solution fell short. The court held that it could not ignore the "core concern" of ascertainability: that a defendant must be able to challenge class membership. This the defendants could not do when there were no records to identify class members and the proposed methods to weed out unreliable affidavits still did not give the defendants a meaningful opportunity to challenge an individual's membership in the class.

However, after applying Third Circuit precedent, the district court leveled in a footnote two criticisms against the heightened ascertainability requirement. First, pointing to language from a 2015 concurring opinion from Judge Rendell of the

Third Circuit and a recent Seventh Circuit opinion rejecting the Third Circuit's approach, the court stated that heightened ascertainability is "disharmonious" with Rule 23's aims. Rule 23 requires that courts balance the difficulties in managing a class action against the countervailing interests of whether a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Heightened ascertainability, the Seventh Circuit reasoned, upsets this balance by placing too great an emphasis on managing the class action. The result is to effectively bar low-value consumer class actions. Second, the court questioned why affidavits are essentially considered incompetent evidence for class actions while they are competent evidence in most other settings.

*Brecher* and *In re Processed Egg Products* provide key takeaways about ascertainability, but important questions remain.

- The Third Circuit's ascertainability standard continues to be a significant area for both sides to address in Rule 23(b)(3) class actions. This is especially true for consumer class actions involving relatively low-cost goods or services for which consumers are unlikely to keep a receipt after purchase.
- The Second Circuit's adoption of ascertainability as a separate class certification issue, not merely an aspect of Rule 23(b)(3)'s predominance requirement, in a way that tracks the Third Circuit strongly suggests that the parties to class actions in that circuit will need to be prepared to address as an evidentiary matter at the time of class certification whether it is administratively feasible to identify class members.
- Objective criteria, long helpful in demonstrating ascertainability, alone may be insufficient for class certification if it is difficult to determine who meets the objective criteria.

- It remains to be seen whether other circuits will follow the Third Circuit's lead and adopt heightened ascertainability as a separate class certification issue or whether they will continue with the traditional approach of applying a lower level of ascertainability as part of Rule 23(b)(3)'s predominance inquiry. The Eleventh Circuit in a non-precedential opinion recently tilted towards the Third Circuit's approach, whereas the Seventh Circuit expressly rejected that approach. ♦

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