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## Growing Insistence Among Courts For Ascertainability

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Law360, New York (July 18, 2014, 11:30 AM ET) -- Recently, a growing number of courts have denied class certification in cases brought by purchasers of a specific product because those purchasers lacked complete and objective records of their purchases. These courts have explained that a class must be ascertainable to be certified, which requires both an objective definition and an administratively feasible way to determine who meets that definition. Although these courts have not typically relied upon Rule 23's text or the U.S. Supreme Court's class certification case law, these authorities lend further support to these decisions and confirm that courts should be wary of certifying a class when there is no simple way to identify who is in that class.

### Courts Increasingly Recognize Objectively Defined Classes Aren't Always Ascertainable

For years, courts have required that plaintiffs propose a class definition that is ascertainable in order to obtain certification. In its simplest terms, ascertainability seeks to ensure that the court ultimately will be able to identify each person who is a member of the class. Historically, courts often denied certification for ascertainability reasons when the proposed class was defined to include only those individuals capable of proving the elements of their claims, such as "all purchasers of a product who suffered an injury as a result of a defendant's misrepresentation." These courts recognized that classes defined in such a way are not ascertainable, since membership in that class can only be determined with individual proof<sup>[1]</sup> from each specific claimant.

Courts also have found ascertainability lacking in a second category of cases. In these cases, plaintiffs define their proposed class using objective criteria, such as "all purchasers of a product during a specific period of time and within certain geographic boundaries." But because there were no objective or complete records of who actually meets this criteria, such as a list identifying each purchaser, there is still no way to determine who is a class member without individual proof.

One such example is *Carrera v. Bayer Corp.*, in which the Third Circuit reversed class certification because plaintiffs had offered no way to determine class membership without individual proof. The court explained that "the method of determining whether someone is in the class must be "administratively feasible." A plaintiff does not satisfy the ascertainability requirement if individualized fact finding or mini-trials will be required to prove class membership."<sup>[2]</sup> Two months ago, the Third Circuit denied plaintiff's petition for rehearing en banc in *Carrera*, despite a four-judge dissent that criticized the decision as "giv[ing] the impression to many that we now carry [the ascertainability] requirement too far."<sup>[3]</sup>

Contrary to the dissent's concerns, however, *Carrera* is not an outlier. With growing frequency, courts around the country are rejecting class certification where class members lack receipts and other objective proofs of purchase such that individual proof would be necessary to resolve class membership. These decisions include five district court decisions in California, that denied class certification to purchasers of nutrition bars, fruit juice, anti-fungal products, frozen waffles and lip balm,<sup>[4]</sup> an unpublished Ninth Circuit decision affirming a district court's refusal to certify a class of online game

purchasers,[5] a New Jersey district court that declined to certify a class of purchasers of margarita beverages,[6] a Florida district court which denied certification in a case brought by the purchasers of a dietary supplement,[7] a Missouri district court that rejected certification of claims brought by purchasers of crackers and cookies[8] and a New York district court that rejected class certification of claims of purchasers of teas and fruit drinks.[9]

As in *Carrera*, these courts recognize that defining a class based on objective criteria does not alone make that class ascertainable. Determining whether each individual claimant satisfies that criteria also must be administratively feasible.

### **Requiring 'Administrative Feasibility' is Consistent with Well-Established Class Action Principles**

These courts often do not expressly rely upon the text of Rule 23 when reaching these outcomes, leading some critics to suggest that ascertainability is not a requirement of the rule. Those concerns are misplaced. Rule 23 — and the Supreme Court’s decision in *Comcast v. Behrend Corp.* applying it — confirm that plaintiffs must offer evidence of an administratively feasible way to determine who is in the class before a court grants class certification.

In particular, *Comcast* held that courts must undertake a “rigorous analysis” at the certification stage that examines whether plaintiffs offered “evidentiary proof” that “affirmatively demonstrate[s]” the requirements of Rule 23(b)(3) are satisfied. Accordingly, courts must consider whether plaintiffs have demonstrated that common issues predominate over individual issues, including the individual issues raised by class membership. Furthermore, although most post-*Comcast* decisions have focused on predominance, Rule 23(b)(3) also requires that a class action be “superior” to other methods of adjudication and directs courts to consider “the likely difficulties in managing a class action,”[10] including difficulties identifying who is actually a class member.

That is precisely what these courts are doing, even though they often couch their analysis in terms of “ascertainability,” rather than predominance or superiority. These courts recognize that, if there are no objective, reliable and complete records of class membership, any person who claims to be entitled to damages will need to offer individual proof to establish their claims and recover. As the Supreme Court has explained, class actions are an exception to the rule that only the named parties to a case are bound by the findings and judgment in that case.[11] That exception, of course, extends only to those individuals who actually are part of the class. If an individual is not a class member, that person cannot rely on any common findings of liability or share in any judgment in favor of the class. Thus, without proof that they are a class member, a claimant cannot prove that defendant is liable to him or her. Class membership therefore is critical to the class certification analysis.

In an effort to circumvent these issues, plaintiffs have proposed that claimants can simply submit sworn affidavits attesting to their class membership. As courts have recognized, this approach raises serious due process concerns, compromising the defendant’s rights to offer every available defense and cross-examine adverse witnesses. These concerns are well-placed. Almost any court would balk at an approach to class certification that would allow claimants to establish the elements of their claims with self-serving affidavits. There is no reason to afford less process to questions of class membership, which must be resolved in each claimant’s favor as a prerequisite to establishing liability and recovering.

This is particularly true given that class definitions are frequently limited to purchases made within discrete time periods and geographic boundaries or exclude certain models of a product and categories

of potential claimants, such as nonresidents. Under these circumstances, due process requires an opportunity to cross-examine claimants to ensure they do not obtain recovery for purchases they never even made, whether they try to do so by accident or intentional fraud.

And, contrary to concerns that requiring an administratively feasible class definition would eliminate many class actions, for a growing number of products and services in today's marketplace, there are, in fact, records of each purchase. These records, which include transaction logs and electronic receipts, are the kind of complete, objective and reliable evidence that might be used to prove class membership. Where such records do not exist, however, courts should be hesitant to certify a class that down the road would be practically impossible to administer.

In short, the recent increase in cases requiring a class definition that is administratively feasible is consistent with well-established class action principles and due process. Because defendants cannot be liable to claimants who are not in the class definition, courts should continue to determine whether plaintiffs have a practical and manageable way to establish who is in the class before allowing plaintiffs to obtain certification.

[1] 727 F.3d 300 (3d Cir. 2012), reh'g denied, No. 12-2621 (3d Cir. May 2, 2014).

[2] Id. at 308 (citation omitted).

[3] Opinion Dissenting Sur Denial of Petition for Rehearing en Banc, No. 12-2621 (3d Cir. May 2, 2014) (dissent by Judge Ambro, joined by Chief Judge McKee, Judge Rendell and Judge Fuentes).

[4] Sethavanish v. ZonePerfect Nutrition Co., 2014 WL 580696 (N.D. Cal. 2014); In re Pom Wonderful LLC, 2014 WL 1225184 (C.D. Cal. 2014); Minkler v. Kramer Labs. Inc., 2013 WL 3185552 (C.D. Cal. 2013); Hodes v. Van's Intern. Foods, 2009 WL 2424214 (C.D. Cal. 2009); Turcios v. Carma Labs. Inc., 296 F.R.D. 638, 649 (C.D. Cal. 2014).

[5] Williams v. Oberon Media Inc., 468 Fed. App'x. 768, 770 (9th Cir. 2012).

[6] Stewart v. Beam Global Spirits & Wine Inc., 2014 WL 2920806 (D.N.J. 2014).

[7] Karhu v. Vital Pharma. Inc., 2014 WL 815253 (S.D. Fla. 2014).

[8] True v. ConAgra Foods Inc., 2011 WL 176037 (W.D. Mo. 2011).

[9] Weiner v. Snapple Beverage Corp., 2010 WL 3119452 (S.D.N.Y. 2010).

[10] Fed. R. Civ. P. 23(b)(3).

[11] Comcast Corp. v. Behrend, 133 S.Ct. 1426, 1432 (2013).

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