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7th Circ. Stands Out On Ascertainability Of Class Actions

Law360, New York (October 5, 2015, 11:25 AM ET) -- Should a class be certified when there is no administratively feasible mechanism for determining whether putative class members fall within the class definition? In the Third Circuit, the answer is no because such administrative difficulties and the fairness problems they pose render the class unascertainable.

The Third Circuit elaborated this requirement in Carrera v. Bayer Corp., 727 F.3d 300 (3d Cir. 2013), and recently reiterated it in Byrd v. Aaron's Inc., 784 F.3d 154 (3d Cir. 2015). The Fourth and Eleventh Circuits have followed the same rule in recent decisions. These courts have applied this requirement for a number of reasons, including concerns about the time and resources that would have to be expended to locate class members and verify their class membership, and ensuring that defendants are not exposed to bogus claims by individuals who assert class membership but cannot prove they ever purchased the product.

But a couple of months ago, in Mullins v. Direct Digital LLC, the Seventh Circuit expressly parted ways with its sister circuits. It disagreed with what it described as a "heightened" ascertainability requirement that, according to the Seventh Circuit, will serve as a death knell for consumer fraud class actions involving products of so little cost that no consumer would bother to keep a receipt. Thus, it rejected the reasoning of Carrera and similar cases, creating a circuit split and thereby setting the stage for potential U.S. Supreme Court intervention on this issue.

The Mullins court's decision was premised largely on its view that the preservation of consumer class actions involving low-cost products is a policy imperative that outweighs manageability and fairness concerns motivating other courts. Specifically, the court of appeals identified four policy concerns informing the "heightened" ascertainability rulings of other courts: (1) administrative convenience; (2) unfairness to absent class members; (3) unfairness to bona fide class members; and (4) the due process interests of the defendant.

The court acknowledged that these concerns are "substantial and legitimate." But it argued that they can be addressed "by applying carefully the explicit requirements of Rule 23(a) and especially (b)(3) and that, in any event, do not outweigh the "important policy objective of class actions: deterring and punishing corporate wrongdoing." (Citation and internal quotation marks omitted.)

It is this policy calculus that could well become the focus of any future Supreme Court

ruling on ascertainability, whether in this or some future case presenting similar issues. And there are good grounds to argue that the Seventh Circuit got the calculus wrong.

The starting point is the decision's central premise: that it is critical that class actions be available for the vindication of (sometimes very) low-dollar claims. That premise is difficult to defend. Only recently, the Supreme Court expressly stated in American Express v. Italian Colors Restaurant that the class action rule is supposed to be a neutral procedural rule that is not to be weakened in the name of "guarantee[ing] an affordable procedural path to the vindication of every claim." That case dealt with class waiver and arbitration clauses, but the reasoning applies just as well to consumer class actions. Indeed, the court has reiterated in recent class action rulings in a range of contexts (e.g., Shady Grove Orthopedic Associates PA v. Allstate Insurance Co. and Wal-Mart Stores Inc. v. Dukes) that Rule 23 is a procedural device that, under the Rules Enabling Act, is not intended to alter substantive rights. It follows that Rule 23's requirements should not be framed to suit a policy preference that certain favored claims should be more easily certifiable.

Even if there were a legitimate basis to prefer certification of consumer claims, how much weight should that preference have in the certification analysis? For example, would it make sense to certify a consumer class that would cost more to litigate than the class members could ever hope to recover? Mullins implies the answer is yes. In attempting to downplay the adverse effects of fraudulent claims in class actions, for example, the Seventh Circuit acknowledged that "only a tiny fraction of eligible claimants ever submit claims for compensation in consumer class actions," which would seem to imply an understanding that consumer class actions can cost more to litigate than they recover.

Indeed, the Seventh Circuit knows very well the problem of low participation in class actions it has approved. In Eubank v. Pella, after having cleared the way for certification of a class of owners of Pella windows in a prior ruling and the parties settled the claims, the court seemed alarmed to discover that only 1,276 class members submitted claims for compensation despite the fact that 225,000 notices had been sent to the class. The claims sought less than $1.5 million in the aggregate, and the court speculated that they would likely recover only 25 percent of that amount, for a total of less than $375,000. Needless to say, had the case been litigated to trial, the costs of litigation would have easily swamped that amount, especially if, as Mullins acknowledged is required in many cases, damages had to be litigated on an individual basis. After all, a vigorously litigated liability phase could entail millions of dollars in attorneys' fees, but a plaintiff victory on liability would not result in any immediate recovery; it would remain to litigate individual damages proceedings for under 1,300 plaintiffs. That math simply makes no sense. And if the case had involved a truly low-value product — as opposed to windows that likely cost several hundred dollars each — it can be assumed that the potential recovery is decreased and that participation would be even lower than the 0.6 percent rate in Pella, while the litigation costs remain relatively fixed.

It could be argued that it makes no sense to approve such consumer class actions. Indeed, as Mullins itself pointed out with respect consumer suits, "only a lunatic or a fanatic would litigate the claim individually" in light of the low-value nature of such claims. Is the same not true of consumer classes that would cost well more to litigate than could ever be recovered?

The ascertainability requirements enforced by the Third, Fourth and Eleventh Circuits are in part geared toward identifying such losing propositions at the outset and sparing the court and the parties from embarking down a path in which only the lawyers stand to make any money. As Mullins acknowledged, for example, a core concern of the other cases in this area is that identifying class members and verifying their membership would be difficult and expensive. Mullins criticized the "heightened" ascertainability approach for giving too much weight to this issue, asserting that the difficulty in identifying class members should be weighed against other issues (although the only other issue it

identifies is the importance of allowing consumer class actions to go ahead). According to Mullins, courts "normally should" ignore apparent difficulties in identifying class members and "wait and see how serious the problem may turn out to be after settlement or judgment." But this approach does not address the concerns expressed by Carrera and other courts at all; to the contrary, it condemns courts and parties to suffer precisely those problems by incurring the costs and difficulties of class litigation all the way to the end — only to conclude that the class never should have been certified in the first place.

The same is true with respect to the due process concerns recognized by Carrera and other courts. As these courts have explained, low-value consumer claims pose unique problems because class members are unlikely to have objective evidence of purchase, making class membership subject to dispute. Some district courts have sought to bypass this problem by holding that class members could submit affidavits attesting to purchase — without providing for any means for the defendant to contest such self-serving claims. Carrera concluded that such a process is impermissible because the defendant's right to challenge a class member's claim of purchase is rooted in due process and cannot be eliminated for purposes of facilitating class treatment; and any process that would allow for individual challenges would result in administrability problems.

Mullins arguably misperceived this issue, asserting simply that defendants do not have "a due process right to a cost-effective procedure for challenging every individual claim to class membership." That description has it backwards. It is the courts that have approved the use of affidavits without providing defendant with an opportunity to challenge them that have elevated the nonexistent right to a cost-effective procedure above all other considerations — even the defendant's due process right to assert every available defense. The point recognized by Carrera and other courts — and arguably lost on the Mullins court — is that, regardless of who pays for it, a class identification process that will degrade into hundreds or thousands of trials that require the testimony of class members and possibly other witnesses such as family members and the like just to prove class membership makes no sense. In this connection, it is worth remembering the Mullins court's own observation that "only a tiny fraction of" class members will even submit a claim. What sliver of that "tiny fraction" will travel to court to testify to recover a few dollars?

In short, the issue of the "heightened" ascertainbility requirement appears ripe for Supreme Court review. Mullins has nicely framed the issues: the accessibility to certain consumer class actions over items that cost so little that no one saves their receipts on the one hand, versus administrative and fairness concerns on the other. It remains to be seen whether the Supreme Court will step in and decide whether Mullins resolved that balance correctly.

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