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The Class Action Chronicle

Eleventh Circuit Rejects Administrative Feasibility Requirement: What Does the Future Hold for Ascertainability?

As we discussed in our Spring 2017 issue of *The Class Action Chronicle*, courts have struggled to define the ascertainability requirement that is implicit in Rule 23 of the Federal Rules of Civil Procedure. Several courts, including the U.S. Courts of Appeals for the First, Third and Fourth Circuits, have required proof of administrative feasibility — *i.e.*, that the identification of class members will be a manageable process that does not require significant individual inquiry — as a prerequisite to class certification. Other courts, such as the U.S. Courts of Appeals for the Second, Sixth, Seventh, Eighth and Ninth Circuits, have rejected that approach, finding that ascertainability does not mandate proof of administrative feasibility.

The U.S. Court of Appeals for the Eleventh Circuit recently weighed in on this issue in *Cherry v. Dometic Corp.*, No. 1:16-cv-22482-RNS (11th Cir. Feb. 2, 2021), flatly rejecting an administrative feasibility requirement despite the apparent embrace of that requirement in earlier, nonprecedential opinions.

In *Cherry*, the defendant, Dometic, manufactured gas-absorption refrigerators. Some of the refrigerators were subject to a recall due to a defect that increased the risk that the appliances would leak certain chemicals and cause a fire. Dometic estimated that 0.01% of its refrigerators contained that defect. The putative class representatives were 18 owners of recalled Dometic refrigerators. They alleged that the defect was significantly more widespread than Dometic reported, and that almost every refrigerator sold between 1997 and 2016 had a design defect.

The primary issue before the district court at the class certification stage was whether the proposed class satisfied Rule 23's ascertainability requirement. Dometic argued that the class representatives offered no evidence that their proposed method of identification of prospective class members would be workable. In response, the class representatives argued — citing the Ninth Circuit's decision in *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1132-33 (9th Cir. 2017) — that administrative feasibility was not a precondition for certification under Rule 23. They also contended that the proposed class was ascertainable because there were objective criteria for identifying it. The district court agreed with Dometic, denied class certification and dismissed the case.

The class representatives appealed. The Eleventh Circuit reversed and remanded, holding that "administrative feasibility is relevant under Rule 23(b)(3), but it is not a prerequisite for certification." In so doing, the court deviated from its prior unpublished decisions that applied a heightened standard for ascertainability and required proof of administrative feasibility. *See*, *e.g.*, *Karhu v. Vital Pharms., Inc.*, 621 F. App'x 945, 949 (11th Cir. 2015) (holding that the plaintiff's proposal to use the company's sales data to establish class membership was insufficient because the defendant sold primarily to distributors and retailers, and records would not identify class members).

The *Cherry* court found that an administrative feasibility requirement did not follow from the text of Rule 23(a) because the feasibility of identifying class members had nothing to do with the qualifications of the putative class representatives, the practicability of joinder or the existence of common questions of law or fact. It also found that the administrative feasibility requirement did not follow from Rule 23(b). It explained that administrative feasibility is relevant to the court's inquiry under Rule 23(b)(3)(D), which requires consideration of whether a class action is manageable and "superior to other available methods" of resolution, but not dispositive. According to the court, Rule 23 is a balancing test, and the court must balance manageability against other considerations. In other words, a lack of administrative feasibility in identifying class members does not by itself doom certification.

The Eleventh Circuit further emphasized that if a district court reaches Rule 23(b), its inquiry should be comparative. It should first ask, "Would a class action create more manageability problems than its alternatives?" Then, "How do the manageability concerns compare with the other advantages or disadvantages of a class action?" Thus, while the Eleventh Circuit's ruling in *Cherry* precludes class action defendants from defeating class certification based on a threshold administrative feasibility requirement, the decision still allows defendants in the Eleventh Circuit to argue that administrative feasibility and manageability concerns weigh against certification.

Notably, the U.S. Supreme Court still has not addressed the circuit court split regarding Rule 23's ascertainability requirement, despite multiple opportunities to do so. *Cherry* could present another opportunity for it to resolve the growing split if the defendant seeks review of the ruling.

That said, *Cherry* extends a trend in appellate decisions away from the more rigorous approach to ascertainability taken by the First, Third and Fourth Circuits that arguably began with the Seventh Circuit's ruling in *Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015) (decided shortly after the Eleventh Circuit's unpublished ruling in *Karhu*, noted above). Since *Mullins* took issue with the more rigorous approach to ascertainability, other appellate rulings have generally followed its approach to the issue. Similarly, some judges on the Third Circuit have raised questions about the rigorous approach taken in its pre-*Mullins* cases. *See*, *e.g.*, *City Select Auto Sales Inc. v. BMW Bank of N. Am. Inc.*, 867 F.3d 434, 444 (3d Cir. 2017) (Fuentes, J., concurring) (urging court to abandon heightened ascertainability standard); *Byrd v. Aaron's Inc*., 784 F.3d 154, 172 (3d Cir. 2015) (Rendell, J., concurring) ("Our heightened ascertainability requirement defies clarification. Additionally, it narrows the availability of class actions in a way that the drafters of Rule 23 could not have intended."). It may be that the Supreme Court is awaiting further developments in the hopes that the appellate courts will consolidate around a uniform approach to ascertainability.

But there are several policy considerations advanced by the approach taken by the First, Third and Fourth Circuits that argue against the conclusion the Eleventh Circuit reached and that would justify eventual Supreme Court review and lead to reversal of this trend. For example, a driving consideration in the Seventh Circuit's decision in *Mullins* was a policy concern that a strong ascertainability requirement would render class treatment unavailable or infeasible in certain contexts. But the Supreme Court has repeatedly cautioned that the class action rule is supposed to be a neutral procedural rule that does not "guarantee an affordable procedural path to the vindication of every claim." *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013). Nor is Rule 23 intended to alter substantive rights. Accordingly, Rule 23's requirements should not be interpreted to reflect a policy preference that certain types of claims should be more easily certified.

In addition, it is well known that only a small fraction of eligible claimants (in some cases 1% or less) submit claims for compensation in consumer class actions that have been approved. As a result, the cost of litigating many consumer class actions is already higher than the amount that is recovered by class members. For this reason, it makes little sense to certify consumer classes where proof of membership in the class at the time of settlement would degrade into hundreds or thousands of time-consuming and expensive trials that require the testimony of class members and possibly other witnesses (such as family members and the like), just to prove each claimant actually purchased or was harmed by the product at issue. A heightened ascertainability requirement that involves an evaluation of administrative feasibility before certification would thus weed out unwieldy claims at the outset and save courts and parties from expending significant resources on a litigation where consumers stand to receive little actual benefit.

The Eleventh Circuit's decision in *Cherry* by no means resolves the split between the circuit courts on this important issue. While litigants in individual circuits may have clarity on the contours of Rule 23's ascertainability requirement, the issue would still benefit from Supreme Court review to provide class action practitioners and consumers predictability and uniformity regarding the threshold requirements to maintain a class action.

Recent Class Action Decisions of Note

Eighth Circuit Affirms Certification of Large Class of 160,000 Retailers Alleging Fraud in Connection With Credit Card Processing Services

***Custom Hair Designs v. Central Payment Co., LLC*, 984 F.3d 595 (8th Cir. 2020)**

In an opinion written by Judge William Duane Benton, the U.S. Court of Appeals for the Eighth Circuit affirmed the district court's certification of a class of 160,000 small retailers that used the defendant's credit card processing services. The plaintiffs brought claims of breach of contract, fraudulent concealment and civil racketeering, alleging that the defendant misrepresented a number of fees, added fees with no value to retailers and inflated fees without prior approval from issuing banks.

Following a relatively brief analysis, the court found that common questions and answers predominated among the tens of thousands of class members. First, despite differences in the retailers' contracts, all of the plaintiffs alleged failure to get bank authorization; thus, the relevant contract term was uniform. Second, the court determined that any pricing differences among the class would not affect liability, only damages, and that "slight variation in *actual damages* does not defeat predominance if there are common legal questions and common facts." Third, the fact that some of the retailers' contracts authorized two different types of fees did not defeat predominance because the inquiry was "not highly individualized." Fourth, the fact that changes in bank rates caused tier shifts did not defeat predominance.

The Eighth Circuit also held that the reliance requirement for common law fraud is not present in Racketeer Influenced and Corrupt Organizations Act (RICO) cases. Thus, the plaintiff alleged that overpayments from a pattern of systematic mail fraud in the defendant's billing would satisfy RICO's causation requirements, and the issue presented would be common to all plaintiffs. It also rejected the defendant's claims that differences in statutes of limitations defeated predominance, agreeing with the plaintiffs that fraudulent concealment can toll the statute of limitations and can be proven on a classwide basis.

Fifth Circuit Joins Sister Courts To Hold That *Daubert* Applies at Class Certification Stage

***Prantil v. Arkema Inc.*, 986 F.3d 570 (5th Cir. 2021)**

Judge Patrick E. Higginbotham, writing for a panel of the U.S. Court of Appeals for the Fifth Circuit, held that expert evidence relevant to class certification must satisfy *Daubert* requirements, joining multiple other courts of appeals. The plaintiffs brought a putative class action against a manufacturer of a chemical used to make plastics after their facilities released allegedly toxic ash and smoke into the surrounding area following a hurricane. Although the district court excluded one of the plaintiffs' experts, it certified the class in reliance on the opinions of three of the plaintiffs' other experts.

On appeal, the Fifth Circuit vacated the class certification order, in part because the district court failed to ensure that those other experts' opinions fully satisfied the *Daubert* standard that governs the admissibility of expert evidence. In joining multiple other appellate courts that have embraced a full *Daubert* inquiry at class certification, the Fifth Circuit relied on Supreme Court precedent requiring plaintiffs to submit "evidentiary proof" that their claims satisfy Rule 23 and courts to conduct a "rigorous analysis" of such proof. Applying this framework, the Fifth Circuit reasoned that, although the district court excluded the opinions of one expert, its analysis did not apply *Daubert* with "full force." According to the Court of Appeals, this diluted approach to *Daubert* was reflected by the district court's own statement expressing doubt whether a full *Daubert* analysis applied at class certification. In addition, the lower court essentially excused a significant shortcoming of one of the experts (who opined about chemical contamination without addressing background levels) on the ground that the case was at class certification, not summary judgment or trial. As such, the court concluded that the district court was less searching at the class certification stage than it would have been outside of the class certification stage, which was an abuse of discretion. Accordingly, the court vacated the class certification order.

California District Court Rules Plaintiffs Lack Standing To Bring Nationwide Class Claims in States Where They Do Not Reside

***Drake v. Toyota Motor Corp.*, No. 2:20-cv-01421-SB-PLA, 2020 WL 7040125 (C.D. Cal. Nov. 23, 2020)**

Judge Stanley Blumenfeld Jr. of the U.S. District Court for the Central District of California dismissed a putative nationwide class claims brought by residents of California and Illinois for lack of standing. The plaintiffs alleged that the steering wheels of cars manufactured by the defendants were defective and asserted claims under the federal Magnuson-Moss Warranty Act (MMWA), state warranty laws and for unjust enrichment. The court granted the defendants' motion to dismiss the nationwide class claims, reasoning that the named plaintiffs lacked standing to assert claims under the laws of states where the plaintiffs themselves did not reside. In so reasoning, the court explained that a defendant does not have to wait until the class certification stage to challenge a named plaintiff's standing to bring claims on behalf of absent class members under the laws of those individuals' home states. The court further explained that the plaintiffs had not pled any cognizable injuries arising under the laws of states other than California and Illinois and could not seek redress under such laws. Finally, the court held that the plaintiffs could not proceed with nationwide class claims under the MMWA because those claims are derivative of state warranty claims that the plaintiffs lack standing to bring. Accordingly, the court dismissed the nationwide class claims.

Contacts

John H. Beisner
Partner / Washington, D.C.
202.371.7410
john.beisner@skadden.com

Geoffrey M. Wyatt
Partner / Washington, D.C.
202.371.7008
geoffrey.wyatt@skadden.com

Jordan M. Schwartz
Counsel / Washington, D.C.
202.371.7036
jordan.schwartz@skadden.com

Kent T. Hiebel
Associate / Washington, D.C.
202.371.7149
kent.hiebel@skadden.com

Nancy D. Wuamett
Associate / Washington, D.C.
202.371.7576
nzeronda@skadden.com

Skadden, Arps, Slate, Meagher & Flom LLP
One Manhattan West
New York, NY 10001
212.735.3000