

Ninth Circuit Weighs in on Rule 23's "Ascertainability" Requirement

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"Ascertainability?" When courts and commentators use a word that our computer underlines with a squiggly red line, it is a good bet that it will take years of appellate decisions before we understand the new concept. Such is the case with the debate over whether a class must be "ascertainable" or "administratively feasible" to be certified under Federal Rule of Civil Procedure 23.

We are familiar with the basic prerequisites for class treatment under Rule 23(a)—namely, a class must be sufficiently numerous and face common questions of law or fact, the representative parties must have claims that are typical of the class, and those representative parties must be able to adequately represent the class. Nonetheless, whether Rule 23(a) requires that the class meet "administrative feasibility" or "ascertainability" requirements has divided the circuits in recent years. The application of these requirements is particularly important in consumer class actions where defendants argue that the class potentially is so unwieldy that it will be difficult or impossible to determine who the class members are, to give notice to the class, or to process claims.

The Ninth Circuit recently has confirmed that administrative feasibility or ascertainability are not part of the Rule 23(a) analysis. *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017). In doing so, the Ninth Circuit pointed to the problems created when courts inject new, difficult-to-define requirements into rules or statutes. Thus, the opinion also may stand for the proposition that simple English is better and that complicated judicial phrasing may be a sign that courts are adding requirements that the drafters of a statute or rule never intended. More practically, the Ninth Circuit likely has cemented the split in the circuits and made the question ripe for Supreme Court review. See Mayer Brown, *Class Defense Blog*, available at <https://www.classdefenseblog.com/2017/01/ninth-circuit-rejects-meaningful-ascertainability-requirement-class-certification-cementing-deep-circuit-split/> (last visited Feb. 14, 2017).

The Third Circuit first addressed the question of "administrative feasibility" in 2012. In a class action against tire and automobile manufacturers involving run-flat tires, the court held that an additional prerequisite to Rule 23 is its requirement that the class be "readily ascertainable based on objective criteria." *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012). Before *Marcus*, the idea that a class should be "ascertainable" had been broadly understood to mean that a class be clearly defined by objective criteria—after all, "there must be a 'class.'" See, e.g., 7A Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 1760 (3d

ed. 2016) (explaining that requirement). Thus, courts regularly held, almost across the board, that a proposed class must be clearly defined with at least some degree of specificity. See, e.g., *Hawaii ex rel. Louie v. HSBC Bank Nevada, N.A.*, 761 F.3d 1027, 1041 (9th Cir. 2014) (citing *Wilson v. Zarhadnick*, 534 F.2d 55, 57 (5th Cir. 1976)).

But *Marcus* raised the bar for ascertainability. Rather than limiting ascertainability to the requirement that "a class must exist," see Wright & Miller, Federal Practice & Procedure § 1760, the Third Circuit in *Marcus* held that ascertainability requires class representatives to prove that there is a reliable, "administratively feasible" way in which to ascertain existing class members before the class may be certified. *Marcus*, 687 F.3d at 594.

A year later, the Third Circuit further expanded its "administrative feasibility" requirement in *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013), which is now regarded as one of the seminal decisions on the issue. *Carrera* was a class action arising from allegedly false and deceptive advertising of Bayer's diet supplement, One-A-Day WeightSmart. The class representatives in *Carrera* sought to certify a nationwide class of consumers under the Florida Deceptive and Unfair Trade Practice Act, and the issue on appeal was whether the class members were "ascertainable" under the *Marcus* standard. The Third Circuit reversed the district court's order granting certification, holding that class members were not ascertainable because the class representatives had failed to identify a reliable, "administratively feasible" way in which to identify the members of the class. *Carrera*, 727 F.3d at 307. Retailer records of customer purchases did not suffice because *Carrera* had not offered evidence of their reliability. *Id.* at 308-09. Similarly, class member affidavits did not suffice because, according to the court, they would not afford defendants any opportunity to challenge the statements they contained. *Id.* at 309.

Since *Marcus* and *Carrera*, the circuits have split on whether to adopt "weak," "strong," or any ascertainability requirements. See *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 659 (7th Cir. 2015) (describing the "'weak' version of ascertainability" to require that "classes be defined clearly and based on objective criteria"). Just one year after *Carrera*, the Fourth Circuit weighed in, adopting a "strong" version of ascertainability similar to that announced in *Carrera*. See *EQT Prod. Co. v. Adair*, 764 F.3d 347 (4th Cir. 2014) (reversing class certification on the ground that local land records did not provide a reliable, administratively feasible way in which to prove class membership). In 2015 and 2016, six more circuit courts addressed the question, three of which (the Sixth, Seventh, and Eighth) departed from *Carrera* and instead adopted the "weak" ascertainability standard. *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992 (8th Cir. 2016); *Rikos v. Procter & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015); *Mullins*, 795 F.3d 654. The First, Second, and Eleventh Circuits followed *Carrera*. *In re Nexium Antitrust Litig.*, 777 F.3d 9 (1st Cir. 2015); *Brecher v. Republic of Argentina*, 806 F.3d 22 (2d Cir. 2015); *Karhu v. Vital Pharm., Inc.*, 621 F. App'x 945 (11th Cir. 2015).

Finally, this year, in *Briseno*, the Ninth Circuit explicitly rejected the concept that ascertainability or "administrative feasibility" are separate prerequisites to class certification out-

side of Rule 23's stated requirements. Judge Michelle Friedland focused on the text of the Rule, holding that "[a] separate administrative feasibility prerequisite to class certification is not compatible with the language of Rule 23." *Id.* at 1123.¹

Like many of the prior cases on this question, *Briseno* was a consumer class action arising from the sale of Wesson-brand cooking oils that had been labeled "100% natural." *Id.* at 1123. Plaintiffs alleged that the labels were false and misleading because Wesson oils are made of bioengineered ingredients that plaintiffs contended were not "natural." *Id.* They filed putative class actions in 11 states and moved to certify those classes under Rule 23. *Id.* at 1124. ConAgra opposed certification, arguing that plaintiffs had failed to satisfy the Rule 23 prerequisite requiring that they demonstrate an "administratively feasible" way in which to identify members of the class. *Id.* at 1124-25.

In addressing the question, the panel applied the Circuit's traditional interpretive paradigm, focusing on the wording of the statute and its plain meaning. *Id.* at 1125. The panel concluded that Rule 23(a) contained an exhaustive list of class action prerequisites, further noting that "[i]mposing a separate administrative feasibility requirement would render [Rule 23(b)(3)'s] manageability criterion largely superfluous, a result that contravenes the familiar precept that a rule should be interpreted to 'give[] effect to every clause.'" *Id.* at 1126 (second alteration in original). With respect to the more broadly accepted notion of "ascertainability" as a means to determine whether the class has been clearly defined by objective criteria, the panel likewise rejected ConAgra's argument that the Ninth Circuit had ever adopted any such requirement:

We refrain from referring to "ascertainability" in this opinion because courts ascribe widely varied meanings to that term. For example, some courts use the word "ascertainability" to deny certification of classes that are not clearly or objectively defined. *See, e.g., Brecher v. Republic of Argentina*, 806 F.3d 22, 24-26 (2d Cir. 2015) (holding that a class defined as all owners of beneficial interests in a particular bond series, without reference to the time owned, was too indefinite); *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970) (affirming denial of class certification because a class composed of state residents "active in the 'peace movement'" was uncertain and overbroad). Others have used the term in referring to classes defined in terms of success on the merits. *See, e.g., EQT Prod. Co. v. Adair*, 764 F.3d 347, 360 n.9 (4th Cir. 2014) (remanding and instructing the district court to consider, "as part of its class-definition analysis," inter alia, whether the proposed classes could be defined without creating a fail-safe class). *Our court does not have its own definition.*

Id. at 1124 n.3 (emphasis added).

The panel's reasoning ultimately makes clear that Rule 23 was designed to make low-dollar consumer class action cases—such as those arising from individual purchases of cooking oil, tires, or dietary supplements, *see Mullins*, 795 F.3d at 657—possible, not to obstruct their success. The opinion is a win for plaintiffs, as it not only rejects any separate ascertainability or

"administrative feasibility" requirements at the class certification stage, but also can be read potentially to endorse aggregate liability determinations at the certification stage and post-certification claims determinations in any case, even in consumer fraud cases. *See Briseno*, 844 F.3d at 1132. The Ninth Circuit in *Briseno* rejected ConAgra's arguments that plaintiffs are likely to submit fraudulent claims forms or that defendants' due process rights are likely to be infringed by any inability to challenge the validity of a class member's claim. In so doing, the opinion endorses the procedure of using individual class member affidavits to establish claims after the certification stage.

Briseno does not dismiss entirely the concerns underlying the "administrative feasibility" requirement as it has been defined in the sister circuits. The panel acknowledged the validity of those concerns, but held that they are adequately protected by the other requirements of Rule 23. 844 F.3d at 1127-28 (noting that Rule 23(b)(3) contains specific mechanisms for ensuring the manageability of a class action and for mitigating any administrative burdens that action might create). Nonetheless, class action plaintiffs have a strong argument against defendants' attempts to require that plaintiffs prove any particular manner of ascertaining all existing class members at the class certification stage. And perhaps we have a signal from the Ninth Circuit that courts and commentators should pause when they see a squiggly red line.

(Endnote)

- 1 At the time this article was written, the Ninth Circuit had denied ConAgra's petition for en banc rehearing. No petition for certiorari had yet been filed.