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In this Issue:

Background 2
A Sharp Circuit Split 2
Will Certiorari be Granted? 2
Authors 3
For More Information 4

The Ascertainability Debate Part II: Supreme Court Asked to Consider Standard for Identifying Absent Class Members

Should district courts certify class actions in consumer-related litigation when there is no reliable method to identify potential class members? This hotly contested issue has sharply divided courts over whether a plaintiff must prove at the certification stage that she is able to define the class and who belongs in it. The question particularly vexes courts when the only discernible method of proving class membership is either a cash register receipt or reliance upon an often faulty memory.

As we reported recently, one of the key provisions in the proposed federal Fairness in Class Action Litigation Act of 2017 is a requirement that courts determine at the certification stage whether the potential class members can be identified with reference to objective criteria. The legislation would also require that plaintiffs demonstrate there is a reliable and administratively feasible mechanism to determine if class members fit the definition and for distributing monetary relief directly to a substantial majority of the class. This legislation has passed through the House of Representatives and is currently under consideration in the Senate.

In a separate effort to make ascertainability a class certification requirement, a litigant has recently filed a petition for writ of certiorari asking the Supreme Court to resolve a substantial circuit split whether Rule 23 permits a court to certify a damages class where there is no reliable or feasible way to identify potential class members.¹ If the Supreme Court accepts the case, the Court can resolve the circuit split and provide its endorsement that lower courts must, as prerequisite to certification, find that putative class members can be reliably identified to belong in the defined class rather than await a trial or unwieldy and expensive claims process where the veracity of the claims would be tested.

¹ Conagra Brands, Inc. v. Briseno, No. 16-1221, 2017 WL 1353282 (“Conagra Pet.”).



Background

Rule 23 establishes specific requirements for certifying a damages class. Among those requirements are that the claims are typical of the class as a whole, the class representatives will fairly and adequately protect the class interests, common questions of law and fact predominate, and that the class vehicle is superior and more manageable than other resolution methods. While a class certification order must define the class and class members must be given notice, there is no express “ascertainability” requirement in the text of Rule 23.

In the case presented to the Supreme Court for consideration, the plaintiffs had complained that the label on cooking oil showed it to be “100% Natural” when it was not. Plaintiffs sought damages for the difference between the sales price and what truly “100% Natural” cooking oil would cost. During the class certification phase, the defendant argued that a class could not be certified because there was no way to reliably ascertain the class members. The retailers who sold the product did not retain records, and the only method plaintiffs had identified for identifying class members was consumers’ memories about purchasing the cooking oil, which required the consumers to recall small dollar purchases from many years ago. Although it noted the circuit split as to whether the inability to identify class members makes the class unascertainable, the District Court nevertheless certified a class reasoning that requiring a class to reasonably identify class members would effectively prohibit class actions involving low priced consumer goods. On appeal, while also acknowledging the circuit split, and even pointing to conflicting results in similar types of cases from other circuits, the Ninth Circuit Court of Appeals relied on the text of Rule 23 that does not contain an express ascertainability requirement. The Court was not persuaded by the potential for fraud or issues with providing notice to class members that could not be identified.

A Sharp Circuit Split

Decisions from the Second, Third, Fourth, and Eleventh Circuits reflect that plaintiffs must demonstrate class member ascertainability before class certification. That is,

there must be a reliable and administratively feasible way to determine who is in the class that does not require extensive and individualized fact-finding. Ascertainability must be based on more than the “say-so” of class members. Based on this requirement, the Third Circuit rejected certification of a class of individuals who had purchased One-A-Day WeightSmart supplements because plaintiffs put forward no evidence that any records related to the sale had been maintained and had not proposed another reliable method to identify class members.

On the other hand, in the Sixth, Seventh, Eighth, and Ninth Circuits, classes have been certified where plaintiffs have not provided a reliable and feasible method for determining the class members. For instance, the Seventh Circuit upheld class certification for a class of plaintiffs who purchased Instaflex Joint Support despite the fact that there were no records for the large number of retail consumers. The Seventh Circuit reasoned that there was no ascertainability requirement and that imposing one could prevent low-value consumer class actions from being certified.

Will Certiorari be Granted?

In 2016, the Supreme Court denied review in two cases presenting ascertainability issues. However, the present case may be different because, unlike the prior two cases, ascertainability is the *only* issue and, other than the class members’ “say-so,” there is no way to identify potential class members.

As with most cases, it is difficult to predict which ones the Supreme Court will hear. But, because of the severe circuit split, if the plaintiffs had brought their case in the Third Circuit, they would have been denied class certification, but were certified in the Ninth Circuit, this issue is ripe for review. This case also involves individually low-dollar consumer claims, thus implicating public policy related to consumer class actions. The Ninth Circuit case exemplifies the circuit split and the case presents a very clear and legally succinct ascertainability issue, so it is entirely possible the Supreme Court will hear this case and provide guidance on this very important issue.





Authors:



Mark A. Olthoff
816.395.0620
molthoff@polsinelli.com



Caitlin J. Morgan
214.661.5513
cmorgan@polsinelli.com





For More Information

For questions regarding this alert or to learn more about how it may impact your business, please contact one of the authors, a member of our **Class Action Litigation** practice, or your Polsinelli attorney.

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