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Revisiting Ascertainability: The Ninth Circuit Court of Appeals Weighs in on "Ascertainability" for Class Certification

By Robert W. Sparkes, III

Over the past four years, the federal circuit courts have frequently been called upon to address the proper role and scope of the "ascertainability" requirement in the class certification analysis. The results have varied by circuit, requiring practitioners and the district courts to unravel the differing standards and wade through the confusion left in the wake of each new decision. The circuit split is best exemplified in the different standards adopted by the U.S. Courts of Appeal for the Third Circuit and the Seventh Circuit, which have been discussed in detail in prior K&L Gates alerts.[1]

On January 3, 2017, the Ninth Circuit joined the chorus of federal courts speaking on the issue of ascertainability in *Briseno v. ConAgra Foods, Inc.*[2] The Ninth Circuit, however, went further than its sister courts; it not only rejected a "heightened" ascertainability requirement, it appears to have rejected ascertainability altogether. The *Briseno* decision appears to blaze a new path that widens the circuit split and may set the stage for eventual resolution by the U.S. Supreme Court.

The Ascertainability Circuit Split: A "Heightened" Standard Versus a "Weak" Standard

Although Rule 23 of the Federal Rules of Civil Procedure does not identify it as an express prerequisite to class certification, the vast majority of federal courts have recognized ascertainability as an implied requirement to certification of a putative class.[3] The basic premise of ascertainability asks a relatively straight-forward question: Is the proposed class defined such that class members can be identified? Complications arise, however, when one attempts to answer the next logical question: What must a plaintiff show to affirmatively demonstrate ascertainability at the class certification stage?

The Third Circuit has offered the most definitive answer to that question, adopting what has been styled as a "heightened" ascertainability standard. Under that standard, a plaintiff seeking to certify a putative class under Rule 23(b)(3) must demonstrate that "(1) the class is 'defined with reference to objective criteria'; and (2) there is 'a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.'"[4] An "administratively feasible mechanism" is one that is manageable and "does not require much, if any, individual factual inquiry."[5] The Third Circuit's heightened standard requires an affirmative evidentiary showing and imposes a heavy burden on the party seeking certification.[6]

Following the Third Circuit's lead, the Eleventh Circuit has adopted a comparably-rigorous ascertainability standard that requires a plaintiff to prove the existence of "an administratively feasible method by which class members can be identified."[7] Similarly, the Second Circuit

has signaled its approval of a standard focused on "whether the class is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member."[8] The Second Circuit has instructed that a proposed class is ascertainable only when it is "defined by objective criteria that are administratively feasible and when identifying its members would not require a mini-hearing on the merits of each case."[9] The Fourth Circuit has also suggested its agreement with a standard that evaluates whether there is a feasible, realistic, and manageable way to identify members of a proposed class.[10]

On the other end of the spectrum, the Seventh Circuit has rejected the heightened standard and adopted a self-described "weak version" of ascertainability.[11] Under the Seventh Circuit's standard, ascertainability requires only that a proposed class be "defined clearly and based on objective terms."[12] In practice, this means that a proposed class cannot be defined vaguely, by subjective criteria, or in terms of the merits of the putative class claims.[13] Under the "weak version," a plaintiff need not prove the existence of a "reliable and administratively feasible mechanism" for identifying class members.[14]

The Sixth Circuit and the Eighth Circuit have followed the Seventh Circuit. The Sixth Circuit has held that a class is sufficiently defined where class membership can be determined "by reference to objective criteria."[15] The Eighth Circuit has also signaled that ascertainability is satisfied where the putative class is defined by "objective criteria" that make the putative class members identifiable.[16]

Although ascertainability plays a smaller part in the class certification analysis in the these three circuits, each still recognizes and applies ascertainability as a prerequisite to certification of a Rule 23(b)(3) class.[17]

The Ninth Circuit Enters the Fray and the Circuit Split Widens

Against the backdrop of the circuit split, the Ninth Circuit in *Briseno* addressed the issue of "whether, to obtain class certification . . ., class representatives must demonstrate that there is an 'administratively feasible' means of identifying absent class members."[18] The Court was urged by the defendant to adopt a heightened standard consistent with the Third Circuit. The Ninth Circuit responded with an unequivocal "no," refusing to adopt an "administrative feasibility prerequisite" for class certification.[19]

The Ninth Circuit found such a requirement is "not compatible with the language of Rule 23."[20] According to the Court, the plain language of Rule 23 does not support an express or implied "freestanding administrative feasibility prerequisite" and a separate feasibility requirement would render the manageability considerations underlying Rule 23(b)(3) "largely superfluous."[21] Echoing the Seventh Circuit, the Ninth Circuit also dismissed the policy reasons underlying the heightened standard, finding that "Rule 23's enumerated criteria already address the interests that motivated the Third Circuit and, therefore, that an independent administrative feasibility requirement is unnecessary."[22]

Although the Ninth Circuit's decision was limited to the narrow question of whether a named plaintiff "must proffer an administratively feasible way to identify class members," the implications of the Court's decision may reach further.[23] The *Briseno* decision suggests the Ninth Circuit's rejection of an ascertainability requirement in any form.[24] The Ninth Circuit refused to recognize ascertainability as an implied requirement for certification,[25] noting that it had never adopted an ascertainability requirement of any kind.[26] Instead, the Court explained that it has addressed the types of class-definition based deficiencies that other

circuit courts treat under an ascertainability analysis "through analysis of Rule 23's enumerated requirements."[27]

The Ninth Circuit's decision in *Briseno* appears to extend beyond even the "weak version" of ascertainability followed by the Sixth, Seventh, and Eighth Circuits. But, lest entities defending putative class actions in the Ninth Circuit despair, *Briseno* does not provide a free pass to plaintiffs who offer vague, subjective, merits-based, or other unworkable class definitions. That is because the Ninth Circuit did not abandon the "definitional deficiencies" and policy considerations underlying the concept of ascertainability; it simply chooses to address them under the rubrics of the express requirements of Rule 23.[28] As such, the *Briseno* decision does not relieve a plaintiff from defining his or her proposed classes clearly, objectively, and in terms that permit identification of the putative class members, without resorting to individualized inquiries.

Conclusion

While pitched as a narrow decision, the Ninth Circuit's ruling in *Briseno* is sweeping in its apparent rejection of ascertainability as playing any role in the class certification analysis. In that respect, the *Briseno* Court expands the existing circuit split to its outer-limit. Nevertheless, the Ninth Circuit, like the Sixth, Seventh, and Eighth Circuits before it, appears to remain dedicated to carefully and rigorously evaluating putative class claims, including how those claims are defined, as part of the consideration of the requirements enumerated in Rule 23. For this reason, the Ninth Circuit's decision is not, and should not be read to constitute, an open door for plaintiffs to advance poorly defined or unascertainable classes in the Ninth Circuit.

The ascertainability circuit split now stands as follows: (1) at least two circuits — the Third and the Eleventh — are committed to a heightened ascertainability standard; (2) two additional circuits — the Second and the Fourth — appear to lean towards the heightened standard; (3) three circuits — the Sixth, Seventh, and Eighth — adhere to a so-called weak ascertainability standard focused on whether the class is defined in objective terms; and (4) one circuit — the Ninth — has rejected ascertainability as a requirement for class certification all together. As courts continue to take divergent positions on this important issue, it is clear that the time is ripe for the U.S. Supreme Court to take up the issue and inject a measure of consistency into the class certification analysis.

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[1] *See* Robert W. Sparkes, III, *GRASPING FOR A HOLD ON "ASCERTAINABILITY": THE IMPLICIT REQUIREMENT FOR CLASS CERTIFICATION AND ITS EVOLVING APPLICATION* (August 26, 2015), http://www.klgates.com/grasping-for-a-hold-on-ascertainability-the-implicit-requirement-for-class-certification-and-its-evolving-application-08-26-2015/.

[2] *Briseno v. ConAgra Foods, Inc.*, --- F.3d ---, 2017 WL 24618 (9th Cir. Jan. 3, 2017).

[3] *See*, *e.g.*, *Sandusky Wellness Center, LLC v. Medtox Scientific, Inc.*, 821 F.3d 992, 995 (8th Cir. 2016); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 19 (1st Cir. 2015); *Brecher v. Republic of Argentina*, 806 F.3d 22, 24 (2d Cir. 2015); *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 525 (6th Cir. 2015); *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 659 (7th Cir. 2015); *Karhu v. Vital Pharmaceuticals, Inc.*, 621 F. App'x 945, 947 (11th Cir. 2015); *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014); *Carrera v. Bayer Corp.*, 727 F.3d 300, 303-04 (3d Cir. 2013).

[4] *Byrd v. Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir. 2015) (quoting *Carrera*, 727 F.3d at 305).

[5] *Carrera*, 727 F.3d at 307-08.

[6] *See id.* at 306-08.

[7] *Karhu*, 621 F. App'x at 947-48.

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[8] *Brecher*, 806 F.3d at 24 (internal quotation marks omitted).

[9] *Id.* at 24-25 (rejecting the argument that "reference to objective criteria" is the sole requirement for establishing ascertainability) (internal quotation marks omitted).

[10] Although it has not affirmatively adopted the Third Circuit's heightened standard, the Fourth Circuit has cited favorably to Third Circuit precedent and explained that "[a] class cannot be certified unless a court can readily identify the class members in reference to objective criteria." *EQT Prod. Co.*, 764 F.3d at 358 (citing *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 592-94 (3d Cir. 2012)).

[11] *See Mullins*, 795 F.3d at 659-60.

[12] *Id.* at 659.

[13] *See id.* at 659-60.

[14] *See id.* at 661-62 (criticizing the "administratively feasible mechanism" requirement as "erect[ing] a nearly insurmountable hurdle at the class certification stage in situations where a class action is the only viable way to pursue valid but small individual claims").

[15] *Rikos*, 799 F.3d at 525-26; *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 538 (6th Cir. 2012).

[16] *Sandusky Wellness Center, LLC*, 821 F.3d at 997-98.

[17] *Rikos*, 799 F.3d at 525-26; *Sandusky Wellness Center, LLC*, 821 F.3d 997-98.

[18] *Briseno*, 2017 WL 24618, at *1.

[19] *Id.*

[20] *Id.*

[21] *Id.* at *1, *4 ("we decline to interpose an additional hurdle into the class certification process delineated in the enacted Rule [23]").

[22] *Id.* at *5 (citing *Mullins*, 795 F.3d at 662-72).

[23] *Id.* at *3 n.4.

[24] *See id.*

[25] *See id.*

[26] *See id.* (noting that defendant "cites no other precedent to support that notion that our court has adopted an 'ascertainability' requirement. This is not surprising because we have not.").

[27] *Id.*

[28] *See id.* at *3 n.4, *5.

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