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ASCERTAINABILITY IN CALIFORNIA CLASS ACTIONS: A SPLIT IN FEDERAL AND STATE COURTS



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Federal Rule of Civil Procedure 23(a) and California Code of Civil Procedure section 382 set out the requirements for class certification in federal and state courts. Both rules require numerosity, commonality, typicality, and adequacy. However, state and federal courts in California disagree about an implicit factor in the class certification analysis:

ascertainability.

Three cases make the ascertainability requirement in California class actions particularly bewildering. *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017), holds that the ascertainability requirement does not apply in the Ninth Circuit. *Aguirre v. Amscan Holdings, Inc.*, 234 Cal. App. 4th 1290 (2015), and *Noel v. Thrifty Payless, Inc.*, 17 Cal. App. 5th 1315 (2017), review granted Feb. 28, 2018, agree that the requirement applies in state court, but they disagree on its application. Because the California and United States Supreme Courts have not spoken fully on ascertainability, litigants are left in the dark when entering class certification battles in California.

This article analyzes the different approaches to ascertainability in these cases and offers possible strategies for litigants awaiting guidance from the U.S. and California Supreme Courts on ascertainability.

Ascertainability Defined

Ascertainability is a requirement that a class plaintiff propose an administratively feasible method to objectively identify and notify potential class members. Ascertainability

is not expressed in either federal or state class action rules, but some courts consider it an implicit requirement for class certification.

Courts that require ascertainability use it to evaluate the explicit requirements of Rule 23. As the Third Circuit puts it, “independent ascertainability inquiry ensures that a proposed class will actually function as a class.” *Byrd v. Aaron’s Inc.*, 784 F.3d 154, 162 (3d Cir. 2015). To determine ascertainability, a court will ask whether “(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.” *Id.* at 163 (internal quotations omitted). Ascertainability seeks to serve the due process rights of both plaintiffs and defendants. It gives notice to the former of a pending litigation in which the judgment will bind them. *Aguirre*, 234 Cal. App. 4th at 1300. To the latter, it allows defendants to test the reliability of the evidence submitted to prove class membership. *See Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013).

Briseno – No Ascertainability Requirement in the Ninth Circuit

Plaintiffs in *Briseno* argued that a Wesson-brand cooking oil labeled “100% Natural” misled consumers because the oil contained bioengineered ingredients. Plaintiffs defined the class as “[a]ll persons who reside in the State[] of California . . . who have purchased Wesson Oils within the applicable statute of limitations” *Id.* at 1124. ConAgra argued that plaintiffs failed to show ascertainability because they could not point to an “administratively feasible” method to identify members of the proposed class: Consumers generally do not save grocery receipts and are unlikely to remember details about low-cost

purchases like cooking oil. *Id.* at 1125. In other words, defendants would require plaintiffs to present a method that would ascertain who purchased the cooking oil.

The Ninth Circuit refused to adopt an ascertainability standard that would require plaintiffs to show an administratively feasible method to identify class members. The panel relied on a plain reading of Rule 23(a), which does not express any requirement of ascertainability or administrative feasibility. *Id.* The panel concluded that plaintiffs met their burden under Rule 23(a) simply because “the class was defined by an objective criterion: whether class members purchased Wesson oil during the class period.” *Id.* at 1124. Therefore, plaintiffs seeking class certification should not face additional administrative burdens in identifying their class under Rule 23. *Id.* at 1128. Also, courts should not “impose a free-standing” ascertainability prerequisite to the Rule 23 certification analysis. *Id.* at 1126.

Certiorari seemed likely in *Briseno* given a clear circuit split. The Sixth, Seventh, Eighth, and Ninth Circuits have rejected the ascertainability requirement, while the First, Second, Third, and Eleventh Circuits have adopted some form of an ascertainability standard. But the Supreme Court denied certiorari without comment—maintaining the split among federal circuits. *ConAgra Brands, Inc. v. Briseno*, 138 S. Ct. 313 (2017).

Past cases may signal how some justices will approach the issue of ascertainability when it debuts in the Supreme Court. For example, as a judge on the Second Circuit, Justice Sonia Sotomayor wrote that a refusal to certify a class “on the sole ground that it would be unmanageable is disfavored and should be the exception rather than the rule.” *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 140 (2d Cir. 2001) (internal quotations omitted). Justice Neil Gorsuch, on the other hand, may favor an ascertainability requirement for 23(b)(2) classes seeking injunctive relief. Writing for the Tenth Circuit in *Shook v. Board of County Commissioners of County of El Paso*, he stated, “the factual and legal concerns leading the court to consider problems of identifying the class could be relevant to, among other things, whether final injunctive relief was appropriate within the meaning of Rule 23(b)(2).” 543 F.3d 597, 611 (10th Cir. 2008) (internal quotations omitted).

***Aguirre and Noel* – Ascertainability Required In State Court, But Courts Vary In Application**

Unlike the Ninth Circuit, the California state courts impose an ascertainability requirement. *See Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004, 1021 (2012). But how to apply the requirement is far from settled. This difficulty has caught the California Supreme Court’s attention.

In *Aguirre v. Amscan Holdings, Inc.*, plaintiffs alleged that defendant Party America violated plaintiffs’ privacy by collecting ZIP codes from customers who used credit cards. 234 Cal. App. 4th at 1294. Plaintiff Aguirre defined the class as “[a]ll persons in California from whom Defendant requested and recorded a ZIP code in conjunction with a credit card purchase transaction from June 2, 2007 through October 13, 2010” *Id.* at 1293. Defendants argued that plaintiffs “failed to establish that ‘there exists a “means for identifying class members.””” *Id.* at 1297 (emphasis in original). The Third District Court of Appeal disagreed: Plaintiff’s “inability to clearly identify, locate and notify class members through a reasonable expenditure of time and money” is not a reason to deny class certification. *Id.* at 1301. It was sufficient that she “defin[ed] the class in terms of objective characteristics and common transactional facts making the ultimate identification of class members possible when that identification becomes necessary.” *Id.* at 1300. Requiring plaintiff to establish the means of identifying class members at class certification would “conflict with the liberal notice provisions contained in California Rules of Court, rule 3.766(f).” *Id.* at 1301.

But in *Noel v. Thrifty Payless, Inc.*, Division 4 of California’s First Appellate District applied a more stringent ascertainability requirement. In *Noel*, plaintiff claimed that defendants engaged in false advertising when an inflatable pool that plaintiff purchased from Rite Aid did not fit two adults and three children as pictured on the box. 17 Cal. App. 5th at 1322. Plaintiff defined the class as “[a]ll persons who purchased the Ready Set Pool at a Rite Aid store located in California within the four years preceding the date of the filing of this action.” *Id.* at 1326. Here, the court denied certification because plaintiff “failed to articulate and support with evidence any means of identifying potential class members.” *Id.* (emphasis in

original). The *Noel* court required plaintiff to offer evidence or a method to clearly identify, locate, and notify who purchased the pools. *Id.* at 1328-29.

Noel also criticized the reasoning in *Aguirre*. Finding *Aguirre*'s language too "absolute," the court stated, "[w]e do not endorse the view that individual members of the class must be identified by name at the time of a class certification motion, but we do not think it violates class action doctrine or public policy to require some showing of a means of identifying them and a description of how notice might be given." *Id.* at 1332 (emphasis in original). *Noel* went on to explain that *Aguirre*'s approach of allowing trial courts to ignore the issue of identifying classes at the certification stage would sacrifice due process concerns of facilitating notice to the class. *Id.*

The California Supreme Court granted review in *Noel* on February 28, 2018. *Noel v. Thrifty Payless*, 229 Cal. Rptr. 3d 344 (Cal. 2018). Briefing is under way. The issue on review is: "Must a plaintiff seeking class certification under Code of Civil Procedure section 382 or the Consumers Legal Remedies Act (CLRA) demonstrate that records exist permitting the identification of class members?" It seems likely that the Supreme Court will take a close look at ascertainability. The Court will likely look at the plain meaning and possibly the legislative history of section 382 and the CLRA. Ultimately, the Court will have to decide exactly when it will require a plaintiff to objectively state the means of identifying class members. Will the Court raise the ascertainability hurdle at the certification stage or kick the can down the road as *Aguirre* suggests?

Takeaways for California Litigants

Until the California Supreme Court provides guidance, hopefully in *Noel*, it is unclear what state-court plaintiffs must prove at the class certification stage. It is not clear if an objective class definition is sufficient to meet ascertainability. In light of *Noel*—which pending the Supreme Court's decision "has no binding or precedential effect, and may be cited for potentially persuasive value only," see Cal. Rules of Ct., rule 8.1115(e)(1)—plaintiffs should still present the most objective means of identifying class members in the form of receipts, affidavits,

photographs, purchase records, or other forms of business or personal records. Moreover, the most obvious takeaway for a California plaintiff desiring to avoid the ascertainability requirement at the class certification stage is to file in federal court where *Briseno* will control.

For defendants, *Noel* provides a playbook for large consumer class actions involving low-price items—where ascertainability battles are most likely to take place. Defendants should highlight plaintiff's difficulty in presenting an objective method that reveals who bought defendant's product because consumers rarely keep their receipts for low-price purchases and there is no product registration for these products. It is unclear if other methods such as rewards programs or store memberships record the products a consumer purchases.

Defendants opposing class certification in any California trial court should also think carefully about removal. A defendant served with a class action complaint in Superior Court may choose not to remove to federal court because of *Briseno*. If defendants stay in Superior Court, they can push the court to require plaintiff to submit evidence on the means of identifying potential class members. But a court that follows *Aguirre* may apply a loose ascertainability requirement.

Moreover, the subject matter of the class action may further complicate the analysis of whether to remove to federal court. For instance, defendants facing securities class actions in state court often immediately remove to federal court, where the Private Securities Litigation Reform Act (PSLRA) offers protection from frivolous suits. Defendants in this position should carefully consider whether they want to give up having some kind of ascertainability requirement in exchange for PSLRA protections such as heightened pleading standards or discovery stays.

Yet, until the high courts of the United States and California weigh in, California class action litigants are left with *Briseno*, *Aguirre*, and *Noel* to figure out how to argue the ascertainability requirement for their clients.

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