Third Circuit Steps Back from the Brink of a Circuit Split over "Ascertainability"

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Yesterday, a panel of the Third Circuit Court of Appeals took another step back from a circuit split over the extent to which aspiring class plaintiffs must show a "reliable and administratively feasible means of determining whether putative class members fall within the class definition," and one judge called for scrapping that requirement altogether.

In *City Select Auto Sales Inc. v. BMW Bank of N. Am Inc.*, 2017 WL 3496532 (3d Cir. Aug. 16, 2017), 10,500 car dealers received unsolicited fax advertisements in 2012 about a customer-facing finance program. The sender did not preserve the 2012 database used to generate the fax list, but it had a larger 2014 version of the database. The plaintiff proposed to determine class membership through a combination of that over-inclusive database and affidavits from fax recipients.

The district court likened the case to *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349 (3d Cir. 2013), where the plaintiff proposed a class of customers who bought items "as-is." The defendant there had a database of "price override" transactions, but it did not know which of those overrides reflected an "as-is" transaction. In *Hayes*, the Third Circuit reversed a district court's order certifying a class, and remanded for further proceedings, because the plaintiff had not met his burden under Rule 23.

In *City Select*, the Third Circuit held that the district court misconstrued *Hayes*. All that happened in *Hayes*, it said, was a remand "so that plaintiff could propose reliable and administratively feasible methods of answering [the key] questions without requiring extensive and individualized fact-finding." The panel wrote that "our ascertainability precedents do not categorically preclude affidavits from potential class members, in combination with" a database of potential members, "from satisfying the ascertainability standard."

Importantly, the panel reiterated—at least for the fifth time in recent Third Circuit jurisprudence—that "[a]ffidavits from potential class members, standing alone, without records to identify class members or a method to weed out unreliable affidavits," fails to satisfy the ascertainability requirement. The standard is at least affidavits-plus. Footnote 4 in *City Select* is a big one: "While a high degree of over-inclusiveness [in a database relative to the universe of potential class members] could prevent certification, any degree of over-inclusiveness will not do so."

In a concurring opinion, Judge Julio Fuentes agreed that the panel's decision is consistent with current Third Circuit law on ascertainability, but he became the second Third Circuit judge (after Judge Marjorie Rendell) to call for abolishment of the "reliable, administratively feasible mechanism" requirement. Judge Fuentes wrote that the requirement "contravenes the purpose of Rule 23" and "disserves the public" by "creat[ing] and unnecessary burden [on]…the low value consumer class actions that the device was designed to allow." He also believes that the Third Circuit's "heightened" requirement "encourages" companies not to retain records that could be used to identify potential

class members. Like Judge Rendell, he sees the risk of false affidavits in consumer class action cases as “far fetched,” and believes that the existing predominance and superiority requirements of Rule 23(b)(3) suffice to protect a defendant’s due process rights. He urged his colleagues to “join the Second, Sixth, Seventh, and Ninth Circuits in rejecting our added ascertainability requirement” and to require only that classes “be defined in reference to objective criteria.”

So, what now for the ascertainability requirement in its birthplace, the Third Circuit? *City Select* does not look like a great candidate for *en banc* review, but an *en banc* showdown clearly is coming if the Supreme Court does not take up the ascertainability debate in the meantime. For the time being, class action defendants in the Third Circuit still have a direct path to challenging class certification, even at the pleading stage, if class membership clearly must be determined by “say-so” affidavits alone. Affidavits in combination with other corroborating evidence, however, like a database against which an affidavit can be checked, may well suffice in the wake of *City Select*.