Understanding "Ascertainability" in Class Actions Now that the Second Circuit Has Said "No" To It.

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On Friday, the Second Circuit Court of Appeals' decision in *In re Petrobras Securities* refused to adopt what it called a "'heightened' two-part ascertainability test in class action cases. The Second Circuit agreed that class action plaintiffs must show that 'the class is defined with reference to objective criteria,' but did not agree that plaintiffs also must put forward "a 'reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.'" The Third Circuit ostensibly has required both showings in class action cases, but the Second Circuit decided to "join a growing consensus that now includes the Sixth, Seventh, Eighth, and Ninth Circuits," all of which expressly disagreed with their interpretations of the Third Circuit's holdings.

But are the appellate courts really in disagreement?

The Third Circuit, in fact, has never held that "a plaintiff must be able to identify all class members at [the] class certification stage." That quote comes from its 2015 *Byrd v. Aaron's, Inc.* case, where it expressly held the opposite: "a plaintiff need only show that class members *can* be identified." In *Byrd*, the Third Circuit *reversed* a district judge's decision denying class certification on ascertainability grounds, saying the district judge had imposed too strict a requirement.

The Third Circuit's "ascertainability" cases all arose from facts so stark that it is hard to imagine any appellate court in the country would have decided the cases differently. In *Marcus v. BMW of North America, LLC*, nobody—not the plaintiff, not BMW, and not even individual BMW dealers—knew or had any way to learn which cars had been fitted with allegedly defective tires. In *Carrera v. Bayer Corp.*, even the named plaintiff did not remember which diet supplement he had purchased, causing the court to wonder why Bayer should have to swallow every putative class member's affidavit swearing that he or she purchased the subject product without being able to cross-examine. And in *Hayes v. Wal-Mart Stores, Inc.*, where Sam's Club receipts did not include critical information on whether a customer purchased an "as-is" floor model, the Third Circuit merely remanded the case to determine whether the plaintiff could propose a method to establish who did and did not buy both an "as-is" product and a warranty that didn't cover "as-is" products.

The "disagreement" among the Circuits, therefore, is over a concern that may be much more theoretical than real. Taken to an extreme, the ascertainability requirement might mean that where a defendant has no list of class members, and where class members themselves are not likely to have retained receipts for purchases, classes can never be certified. The Ninth Circuit refused to go that far in this year's *Briseno v. ConAgra Foods, Inc.* decision. The Ninth Circuit said it was disagreeing with the Third Circuit, but—and here is the critical part—neither the Third Circuit nor any other appeals court had actually held to the contrary.

To be sure, the Third Circuit has held that "unverifiable" affidavits as a method of proof of class membership may not suffice where reason exists to believe that class members' memories may not be reliable. That should not be particularly controversial. But the Third Circuit has not held, and Judge Rendell's strong concurrence in the *Byrd* case explicitly rejected, that the ascertainability doctrine should be read to "disable[e] plaintiffs from bringing small value claims as a class."

The Second Circuit's new *Petrobras* decision involved securities claims rather than consumer claims. Under Supreme Court precedent, those who purchased Petrobras securities on a domestic exchange could be part of a putative class, but those who purchased securities abroad could not. Although the Second Circuit refused to adopt an "ascertainability" test, it *reversed* the district court's decision to certify a class because the court had not adequately considered, under the "predominance" test of Rule 23(b)(3), how it could distinguish between the two.

It therefore is hard to find much daylight between the Third Circuit in *Byrd*, which reversed a decision denying class certification, and the Second Circuit in *Petrobras*, which reversed a decision granting certification. Both instructed district courts to figure out whether purely individual questions predominate, in which case certification must be denied. The Third Circuit has had more chances to give guidance on how to judge these questions, but unless and until a court comes out the other way in a case that actually resembles one the Third Circuit has decided, it is hard to discern true "disagreement." And the Supreme Court may end up speaking on the question before any real disagreement actually appears.

Class action plaintiffs anywhere in the country, including in the Third Circuit, may try to argue that they should be able to rely on affidavits from putative class members to figure out who is in the class. In any Circuit, however, if the defendant can demonstrate that individual affiants' memories may be unreliable on the key questions, the defendant should be able to overcome class certification. The Third Circuit may have decided to call this "ascertainability," but it may be thought of as predominance under another name, with a healthy helping of a defendant's due process rights.