

LITIGATION

>>ALERT

POSSIBILITY DEFEATS PRACTICALITY: FEDERAL COURT OF APPEALS LIMITS CLASS ACTION DEFENSE REGARDING INFEASIBILITY OF ASCERTAINING CLASS MEMBERS

As discussed in a previous [article](#), in 2013 many federal courts began applying a heightened standard to the long-recognized, but largely overlooked, “ascertainability” prerequisite implicit in the Federal Rules for maintaining a class action.

This heightened standard required plaintiffs to demonstrate not only that the class was clearly defined by objective criteria, but also that it was “administratively feasible” to identify potential class members. Under this approach, lack of administrative feasibility could prevent certification of the class, effectively making certain types of class actions difficult, if not impossible, to maintain. For instance, consumer class actions based on allegedly deceptive marketing of small retail items – in which neither the seller nor the purchaser likely retained proof of purchase or sale necessary to identify whether the purchaser falls within the plaintiff class – likely would not meet this more stringent “administrative feasibility” standard. Courts adopting the heightened ascertainability standard have reasoned that identification of class members would otherwise be overly cumbersome, requiring individual mini-trials to determine whether each putative member fell within the class, which is one of the very situations class actions are designed to avoid.

THE BOTTOM LINE

Given the split among several courts of appeal, *Petrobras* will not be the last word on ascertainability in class action suits. Indeed, this fall, the U.S. Supreme Court will consider a petition for certiorari regarding the certification of a plaintiff class allegedly lacking administrative feasibility. In the interim, however, plaintiffs within the Second Circuit may face one less hurdle in obtaining class certification.

Over the past few years, federal courts have not uniformly adopted this heightened approach to ascertainability. Now, despite a prior decision that appeared to embrace the “administrative feasibility” approach, the Second Circuit has instead joined a growing consensus of courts that have rejected it.

IN RE PETROBRAS SEC’S LITIGATION

The recent case, *In re Petrobras Sec’s Litigation*, involved two classes of allegedly defrauded investors in Brazilian oil and gas company Petrobras. U.S. securities laws protect only investors who acquire securities via transactions that occur in the United States. Petrobras’s securities

did not trade on any U.S. exchange, and the defendants asserted that the District Court would therefore be required to examine each potential class member’s transaction records for other markers of “domesticity” – indications that each transaction somehow occurred in the United States – to determine whether an investor fell within the plaintiff class. Because plaintiffs could not offer a reliable and administratively feasible mechanism to determine “domesticity,” the defendants argued that the class lacked ascertainability.

The Second Circuit disagreed. Although the defendants cited the court’s holding in a 2015 case, *Brecher v. Argentina*, which seemed to require

>> continues on next page

a showing of “administrative feasibility” to satisfy ascertainability, the court explained that *Brecher* did not actually adopt that standard. Rather, the court explained, the putative class of Argentinian bond holders in *Brecher* could not be certified because the class was “insufficiently bounded,” and the class definition lacked any limitation on when investors held their bonds to fall within the class.

While many had read *Brecher* as adopting the stricter administrative feasibility standard, in *Petrobras*, the court “clarified” that *Brecher* merely illuminated the reasons why the Federal Rules require definiteness and objectivity in class definitions. The court further explained that ascertainability is merely a “modest threshold requirement” that considers “whether a proposed class is defined using objective criteria that establish a class membership with definite boundaries.” In other words, “a class should not be maintained without a clear sense of who is suing about what.” The issue at the class certification phase, the court stated, is merely whether a determination of each putative class member is *possible*, not whether it will be *practical*.

Although the Second Circuit rejected administrative feasibility as an absolute requirement for class certification, it nonetheless recognized that defendants can assert the lack of

administrative feasibility in the context of Rule 23(b)(3)’s explicit requirements of “superiority” and “predominance.” Specifically, defendants may raise concerns about managing the class action by arguing that a class action would not be “superior to other methods of adjudicating the dispute,” and may also assert that individualized determinations of class member eligibility predominate over issues that would be common to all members of the proposed class. These approaches, however, relegate “administrative feasibility” to merely one factor to be balanced among others, and not a stand-alone requirement for class certification.

TAKEAWAYS

In the right circumstances, companies may still challenge the administrative feasibility of a proposed class action, but they may not be able to rely on it as an absolute bar to class certification. For example, a company faced with a consumer class action based on deceptive advertising of a small retail product may still highlight that sellers and purchasers are unlikely to have retained records sufficient to identify actual class members. That company could argue that this situation would necessitate an unwieldy process of individually assessing each consumer’s membership in the class. Under the framework of *Petrobras*, this argument would be made in

the more permissive context of arguing that: (1) individualized issues regarding class membership would predominate over questions common to all class members; and (2) the lack of administrative feasibility in ascertaining class members makes a class action inferior to other methods of adjudicating the dispute, such as individual cases. This argument is more difficult to win, but it remains a worthwhile approach, especially when defendants also raise other challenges to class certification.

FOR MORE INFORMATION

Neal H. Klausner
Partner/Co-Chair
212.468.4992
nklausner@dglaw.com

David S. Greenberg
Senior Attorney
212.468.4895
dgreenberg@dglaw.com

Marissa L. Comart
Associate
212.468.4952
mcomart@dglaw.com

or the D&G attorney with whom you have regular contact.

Davis & Gilbert LLP
212.468.4800
1740 Broadway, New York, NY 10019
www.dglaw.com
© 2017 Davis & Gilbert LLP