

**NEW JERSEY APPELLATE COURT REFUSES TO APPLY RESTRICTIVE
"ASCERTAINABILITY" ELEMENT AT CLASS ACTION CERTIFICATION
STAGE, DEPARTING FROM FEDERAL RULE IN "LOW VALUE"
CONSUMER CLASS ACTIONS**

By Kevin J. O'Connor*

In recent years product manufacturers, retailers and service providers of all kinds have faced an onslaught of class actions alleging false advertising or other fraudulent schemes in the marketing of consumer products, and a broad array of other claims under New Jersey's Consumer Fraud Act ("CFA"). In the federal courts, such suits have had many hurdles to overcome, with the "ascertainability" requirement serving as a basis for ending many a class action. That judge-made requirement has come under fire, and a decision today in Daniels v. Hollister Co., A-3629-13T3 (App. Div. May 13, 2013) represents significant hostility toward that doctrine's application at the state level. It has certainly raised the stakes for defendants in New Jersey state court given the Court's decision not to follow the federal rule on ascertainability of a class when dealing with "low damage" claims.

In Daniels, plaintiff brought the lawsuit on his own behalf and on behalf of all similarly situated purchasers from Hollister stores, which operates nationwide. He alleges that in December 2009, Hollister ran a promotion whereby customers who purchased at least \$75 in merchandise were given a \$25 gift card for use in Hollister stores or on its website. Plaintiff alleges that although these transferrable gift cards had no expiration date, Hollister voided all card balances on January 30, 2010. He pled that the store had signs posted which stated that the cards would expire at the end of June, 2010, but many of the cards expressly stated that there was no expiration date.

The trial court had noted an admission by defendant that over \$3 million in gift card balances were voided. Hollister argued against class certification by arguing that its records of who received the gift cards were incomplete, thus the class could not be readily ascertained. This is an element in FRCP 23 jurisprudence which has developed over the years to be a formidable weapon to defeat class actions like the one before the court, but it proved ineffective in Daniels.

Hollister argued that the proposed class was not reasonably ascertainable in the circumstances because it was defined as all persons to whom a gift card had been issued with a notation that the card had no expiration, but which card was later voided, as well as all persons who had discarded such cards because they were told they had expired or had been voided. Id. at 6. Hollister argued that its due process rights would be violated since the class would be difficult to test, because absent class members will have no opportunity to opt out, and because the preclusive effect of any judgment will be unknowable and unenforceable. Hollister's argument was driven in part by language found in a decision of the New Jersey Supreme Court in Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88 (2007).

The Third Circuit has repeatedly held that ascertainability is “an essential prerequisite of a class action” under Rule 23. Carrera v. Bayer Corp., 727 F.3d 300, 306 (3d Cir. 2013) quoting Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 592-593 (3d Cir. 2012). The class must be “currently and readily ascertainable based on objective criteria.” Id. quoting Marcus, 687 F.3d at 593, “If class members are impossible to identify without extensive and individualized fact-finding or ‘mini-trials,’ then a class action is inappropriate.” Id. at 305 quoting Marcus, 687 F.3d at 593.

In Marcus the court held that on remand the Court “must resolve the critical issue of whether the defendants' records can ascertain class members and, if not, whether there is a reliable, administratively feasible alternative.” Marcus, 687 F.3d at 594. The Court then cautioned “against approving a method that would amount to no more than ascertaining by potential class members' say so. For example, simply having potential class members submit affidavits that their [tires] have gone flat and been replaced may not be proper or just.” Id. Finally, it held that forcing the defendants to accept consumers' declarations that they are members of the class “without further indicia of reliability, would have serious due process implications.” Id.

In Carrera the Court held that since Marcus had been decided after the trial court certified the class, it would provide plaintiff with another opportunity to establish ascertainability. As such, plaintiff was required to submit a screening model specific to that case and prove how it would be reliable and how defendant would be able to challenge individual plaintiff's affidavits. It noted, however that “mere assurances” by plaintiff that the model would screen out unreliable affidavits was insufficient. Carrera, 727 F.3d at 311-312.

The Appellate Division engaged in an extensive analysis of the federal cases which have followed the ascertainability element, and ultimately rejected its use in connection with a class certification motion in which “the purported injuries to class members are so minimal as to preclude the likelihood they would be individually asserted.” Slip Op., at 13. The Court expressed “misgivings” about whether the element would be used in any class action, but declined to rule on its applicability “in cases other than those involving low value consumer class actions because of the concept's novelty.”

While adopting a holding that will prove problematic for defendants in cases such as this one where the identities of class members will be difficult, the Court did state in footnote 1 of the decision that while decisions granting or denying class certification are not appealable as of right, the Court would "liberally indulge" future applications for leave to appeal in cases such as these.

The Daniels decision raises the stakes for defendants being sued in state court where class certification is sought. Defendants need to engage counsel well versed in defending class actions. With this new decision, removal of the action to federal court under the Class Action Fairness Act (where permitted) might prove essential if class certification of a class is sought in state court and the members of the proposed class are not readily identifiable.

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