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Is the Ascertainability "Requirement" Plaintiffs' New Foe?

There has been no shortage of attention given to the Supreme Court's *Wal-Mart* and *Comcast* opinions, which address Federal Rule of Civil Procedure 23's commonality and predominance requirements. These groundbreaking opinions should not cause insurance company defendants to lose sight of other helpful developments in class certification jurisprudence. One such development is the recent attention the Third Circuit Court of Appeals has given the implied certification requirement of 'ascertainability.' In three decisions issued in 2012 and 2013, the Third Circuit has overturned trial courts' certification of classes where it found the proposed classes could not be objectively and definitively identified.

Rule 23 does not include among its requirements for class certification that the proposed class must be readily ascertainable. However, many federal courts and secondary authorities recognize that a class must be objectively definable and identifiable by the time it is ready for certification. Perhaps spurred by the Supreme Court's focus on class certification in *Wal-Mart* (in 2011), a panel of Third Circuit judges addressed the issue of ascertainability in *Marcus v. BMW of North America, LLC*. It is too early to tell if the *Marcus* decision is indicative of the way appellate courts will address ascertainability. Regardless, it is the law of the land in at least the Third Circuit, and can provide help to defendants facing potential certification of a murky and ill-defined class in any circuit.

Marcus v. BMW of North America, LLC

In *Marcus*, the District of New Jersey certified a class of purchasers and lessees of BMWs outfitted with "run-flat tires" that had "gone flat and been replaced." Run-flat tires were designed and marketed to allow for up to 150 miles of travel on a punctured tire. (The Third Circuit appreciated the irony of a challenge not to the tires' ability to run while flat, as advertised, but their alleged susceptibility to become flat in the first place.)

On appeal, the Third Circuit explained that if a class cannot be objectively and clearly defined, trial will require "extensive and individualized fact-finding or 'mini-trials,'" rendering the class action vehicle "inappropriate." On the other hand, a properly defined and ascertainable class supports three objectives central to class actions. First, it mitigates the administrative burdens that arise when identifying class members post-certification. Second, and relatedly, it "protects absent class members" who will be properly noticed in opt-out classes. Third, should plaintiffs prevail at trial, it eases the burden on the defendant to satisfy judgment as to each proper class member.

With these objectives in mind, the *Marcus* court held that the class members, under the definition proposed by the plaintiff and certified by the district court, could not be objectively identified. The class definition was unclear because the plaintiffs could not determine, based on the defendants' records, which customers had purchased the run-flat tires and subsequently had them replaced when they went flat.

Because the defendant's records were inconclusive on this point, the court remanded the case to the district court to offer the plaintiffs a chance to submit a "reliable, administratively feasible" method for determining class membership. The court warned against using affidavits of proposed class members to prove that they purchased tires which then went flat and were replaced. To require the defendants

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Whirlpool and *Butler*: Liability-Only Classes in a Post-*Comcast* World

In *Comcast v. Behrend*, the U.S. Supreme Court held that a party seeking class certification under Federal Rule of Civil Procedure 23(b)(3) must establish that damages can be determined on a class-wide basis. Two recent opinions by the Sixth and Seventh Circuits acknowledge a potential way of bypassing this requirement. In *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation and Butler v. Sears, Roebuck and Co.,* the circuit courts affirmed certification of class actions regarding purported design defects in washing machines. In doing so, both courts recognized the ability to certify liability-only classes, reserving the question of damages for subsequent class certification proceedings for individual actions.

In opposing class certification, the defendants in both *In re Whirlpool* and *Butler* argued that many of the washing machines sold to the putative class members did not have any of the purported defects. The circuit courts affirmed class certification. On appeal, the Supreme Court vacated the decisions in light of *Comcast.* On remand, the Sixth and Seventh Circuits held that *Comcast* had no impact upon its previous decisions, and affirmed certification.

In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation

In re Whirlpool, an Ohio-only class brought allegations that design defects in washing machines resulted in the accumulation of mold and mildew. The Sixth Circuit's initial opinion affirming class certification was based in large part on the fact that under Ohio law, breach of warranty claims advanced by the plaintiffs could allow for recovery based upon the payment of a "premium price" for the purportedly defective washing machines. Such a recovery would be available regardless of whether particular washing machines actually manifested mold growth.

On remand, the Sixth Circuit reaffirmed its previous conclusion that the case concerned two questions "that will produce in one stroke answers that are central to the validity of the plaintiffs' legal claims"; (1) whether the defects led to mold growth and (2) whether the defendants had properly warned customers of the potential for mold growth. The court emphasized that, unlike the *Comcast* class that encompassed both liability and damages, the district court in *Whirlpool* "certified only a liability class and reserved all issues concerning damages for individual determination." The Sixth Circuit determined that when the issues of liability and damages have been bifurcated, the Supreme Court's decision in *Comcast* "to reject certification of a liability and damages class because plaintiffs failed to establish that damages could be measured on a class-wide basis" has limited application.

The Sixth Circuit also reaffirmed a liability-only class, observing that if the defendant could disprove liability as to "most" of the class, it could obtain a judgment binding class members who opted out. The court concluded that where a district court ultimately certifies a liability-only class, it can then move on to the damages issue, at which time it may "exercise its discretion in line" with *Comcast* and related cases.

Butler v. Sears, Roebuck and Co.

A similar analysis was offered by the Seventh Circuit in *Butler,* in which the plaintiffs alleged – on behalf of a class of residents of six states – that a design defect in washing machines led to mold growth. Additionally, a separate design defect caused the machines to stop prematurely. While some state laws recognized recovery based on a breach of warranty theory regardless of whether particular washing machines manifested the defects, other states in which the class members resided conditioned recovery on actual harm to the machines.

The court distinguished *Comcast* in two ways. First, the damages model rejected by the Supreme Court in *Comcast* took into account theories of liability that were not at issue in the *Butler* case. There was no possibility in *Butler* that "damages could be attributed to acts of the defendants that are not challenged on a class-wide basis" as all of the class members in the case attributed their damages to the alleged design defects at issue.

Second, as in *Whirlpool*, the Seventh Circuit emphasized the fact that unlike *Comcast*, the trial court "neither was asked to decide nor did decide whether to determine damages on a class-wide basis." The court noted that bifurcating class certification between liability and damages pursuant to Rule 23(c)(4) is often the most "sensible" approach. The court held that individualized issues regarding the determination of damages did not alter its previous finding that common issues predominated. The court emphasized that to mandate that every member of a damages class "have identical damages" would "drive a stake through the heart of the class action device." Because *Butler i*nvolved a single issue of liability – whether the washing machines were defective – the court concluded that common issues predominated and reinstated its previous decision granting class certification.

Conclusion

The defendants in both cases have again sought review before the U.S. Supreme Court. Unless the court holds that these decisions were inconsistent with *Comcast,* plaintiffs may turn to liability-only classes with increasing regularity to avoid the need to develop a model for proving class-wide damages that survives the close scrutiny mandated by *Comcast*. While this raises the potential that damages in such cases will be decided through individual proceedings, certification of liability-only classes could pressure defendants to settle cases certified under Rule 23(c)(4).

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to "accept as true absent persons' declarations that they are members of the class" would raise due process concerns.

Marcus Progeny

In two decisions issued in 2013, both of which involved cases pending at the time of the *Marcus* decision, the Third Circuit further expounded on the ascertainability requirement. The court remanded both with instructions to the district court to apply the clarified ascertainability standard. Both cases involved allegations of misrepresentations to consumers.

The plaintiff in *Hayes v. Wal-Mart Stores, Inc.*, alleged that retail warehouse Sam's Club failed to disclose that its service agreement package did not apply to certain products. As in *Marcus*, the court found that the class members could not be identified through records of the defendant because it was impossible to know which customers had purchased the ineligible products. Notably, the court stated that "the nature or thoroughness of a defendant's recordkeeping does not alter the plaintiff's burden" at class certification.

In *Carrera v. Bayer Corp.*, the plaintiff accused Bayer of making material misrepresentations regarding a diet supplement it sold through retail stores. While the court noted that it was impossible to discern from the records of the retailer or the defendant who purchased the product, it pointed out that there may be instances where a defendant's records could provide enough evidence of class membership to satisfy the ascertainability requirement. The court also held that because a defendant had a right to "challenge the evidence used to prove class membership," affidavits from supposed retail customers were not enough. Separately, the court rejected the plaintiffs' argument that the low value of individual claims mitigated against any threat of fabricated affidavits from potential class member holding. A "core concern" of the court was a defendant's "ability to challenge class membership" regardless of the value of a potential individual award.

Conclusion

The ascertainability standard outlined in the *Marcus* line of cases has yet to be adopted by the other circuit courts or in cases not involving allegations of misrepresentations to consumers. Parties to class actions, however, ignore these decisions at their own peril as the Supreme Court has tightened class certification standards over the last few terms and ascertainability could be addressed in the near future. Regardless, the arguments on which the Third Circuit relies in these cases should be helpful to defendants in any class actions.

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Recent Cases of Note

Ohio Supreme Court Overturns Certification in Insurance Class Action

The Ohio Supreme Court reversed class certification in a case involving allegations that the defendant insurer failed to disclose all benefits available to policyholders who made claims for damaged windshields. In *Cullen v. State Farm Mut. Auto. Ins. Co.*, the plaintiff alleged that the insurer prepared a script and used it to encourage policyholders to repair their windshields rather than receive the actual cash value of the cost to replace them. Both the trial court and the appellate court concluded that a class action was the superior method for adjudicating the case holding common questions of law and fact predominated over individual issues. On appeal, the Supreme Court disagreed with the finding of predominance holding that the individual inspections of each policyholder/class member's windshield would be necessary to determine if the defendant breached its duty and raised issues that would overwhelm questions common to the class.

New York Appellate Court Applies Filed Rate Doctrine to Quell Class Claims Against Insurer

In *W. Park Associates, Inc. v. Everest Nat. Ins. Co.*, New York's Appellate Division, Second Department, dismissed a class action alleging that the defendant insurer improperly charged homebuilding contractors a higher premium for commercial general liability insurance for employing uninsured subcontractors. The appellate division held that because the Insurance Department had approved an exclusion in the policy for uninsured subcontractors and the rating rules that provided for a different calculation of premiums when uninsured subcontractors are used, the filed rate doctrine applied, barring the action.

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Recent Cases of Note

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Circuits Divided Over Significance of Offers of Judgment

In *Diaz v. First Am. Home Buyers Prot. Corp.*, the Ninth Circuit joined the Second Circuit in an Appeals Court split on the contentious issue of the impact of Rule 68. Outlined under the rule, offers of judgment are intended to encourage settlement by prompting parties to evaluate the risks and costs of litigation and to balance them against the likelihood of success at trial. The issue facing the Ninth Circuit was whether an unaccepted offer of judgment that would fully satisfy a claim renders that claim moot. The court held that, if the offer lapses, it becomes a legal nullity and cannot satisfy a pending claim. The Ninth Circuit cited the dissent in *Genesis Healthcare v. Symczyk*, an opinion that did not directly address the question, but which the court felt articulated the correct approach. The court reasoned that its holding is consistent with the language, structure and purposes of Rule 68 as well as the fundamental principles governing the mootness doctrine. The Ninth Circuit joined the Second Circuit on this point, although the Sixth and Seventh Circuit Courts have both disagreed.

Ninth Circuit Applies U.S. Supreme Court's Opinions in *Concepcion* and Italian Colors to Enforce Arbitration Agreements

In *Ferguson v. Corinthian Colleges, Inc.*, the Ninth Circuit held that the Federal Arbitration Act (FAA) preempts California's Broughton-Cruz rule (rule), which provides that claims for public injunctive relief cannot be arbitrated. In *Ferguson*, two plaintiffs brought a putative class action alleging the defendant systematically misled prospective students in order to increase enrollment at its schools. The defendant moved to compel arbitration, citing the schools' enrollment agreements that contain arbitration clauses. The district court granted the defendant's motion, citing the rule. On appeal, the Ninth Circuit found the rule contravened the FAA finding that two recent Supreme Court opinions preempt state laws that preclude enforcement of a particular type of claim to arbitration. *See AT&T Mobility LLC v. Concepcion, Am. Exp. Co. v. Italian Colors Rest.*

Third Circuit Provides Guidance on Class Action Fairness Act Exceptions

In *Vodenichar v. Halcon Energy Properties, Inc.*, the Third Circuit provided guidance on applying the "home state" and "local controversy" exceptions to federal jurisdiction under the Class Action Fairness Act (CAFA). The two exceptions apply when an action is uniquely connected to the state in which it was originally filed. In its decision, the court provided context to two key undefined terms. The court held that to determine whether a defendant is a "primary defendant," the court should see if it is the "real target" of the lawsuit – that is – whether the plaintiff wishes to hold the defendant responsible for its own actions as opposed to paying for the actions of others. The court also held that the phrase "other class action" applies when other lawsuits with similar factual allegations have been made against the defendant in multiple class actions. Applying this principle, the court ruled that a subsequent complaint against the same defendant following an earlier complaint that is withdrawn does not qualify as an "other class action."

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Nelson Levine de Luca & Hamilton

Nelson Levine counsels and advises insurers in the defense of complex, high-exposure issues and the protection of their business practices. Our experienced team handles litigation matters throughout the United States, including the defense of class actions, extracontractual disputes, corporate contingencies, consumer protection suits, defamation matters, and other litigation against insurers.

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