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Ascertainability – Eleventh Circuit holds administrative feasibility is not a class certification requirement, further solidifying circuit split

Takeaway: Administrative feasibility is not a prerequisite for class certification in the Eleventh Circuit, although it remains a relevant consideration under Federal Rule of Civil Procedure 23(b)(3)'s manageability factor. Manageability challenges, however, rarely prevent certification. There is a deep circuit split on this issue, with the Third, First, and Fourth Circuits applying a heightened standard for ascertainability that requires a class representative to propose an administratively feasible method of ascertaining class members at the class certification stage. The Eleventh Circuit, however, solidified the split by joining the Second, Sixth, Seventh, and Ninth Circuits in rejecting administrative feasibility as a class certification requirement.

Dometic Corporation ("Dometic") manufactures and sells "gas-absorption refrigerators" for use in recreational vehicles. In *Cherry v. Dometic Corp.*, --- F.3d ---, No. 19-13242, 2021 WL 346121 (11th Cir. Feb. 2, 2021), the putative class representatives – eighteen owners of Dometic refrigerators – allege that nearly all of Dometic's refrigerators sold over a nineteen-year period contain a design defect that causes the refrigerators to leak a chemical solution, corroding their boiler plates and potentially sparking fires. They further allege that Dometic concealed the defect.

The proposed class consisted of every person in select states who purchased certain models of Dometic refrigerators that were built since 1997. During the class certification stage, the main issue before the district court was whether the proposed class met Rule 23's implied ascertainability requirement. To defeat class certification, Dometic argued that ascertainability required proof of administrative feasibility. The district court agreed with Dometic and denied class certification, applying the Eleventh Circuit's unpublished opinion in *Karhu v. Vital Pharms., Inc.*, 621 F. App'x 945 (11th Cir. 2015), which held that administrative feasibility was an element of the ascertainability requirement. As a result, the district court denied the plaintiffs' motion for class certification and dismissed the action without prejudice, concluding that its denial of certification divested it of subject matter jurisdiction under the Class Action Fairness Act ("CAFA").

The putative class representatives appealed, and the Eleven Circuit vacated and remanded. Looking at Eleventh Circuit precedent and the text of Rule 23, the Eleventh Circuit concluded its unpublished decision in *Karhu* was not binding, and the text of Rule 23 did not establish administrative feasibility as a requirement for class certification.

The decision in *Karhu* applied the heightened Third Circuit standard where proof of ascertainability encompasses both the class definition as well as its administrative feasibility. Rejecting the approach in *Karhu*, the panel concluded class membership can be sufficiently defined at the class certification stage without proof of administrative feasibility.

Because the explicit language of Rule 23(a) does not require administrative feasibility, it does not bear on a district court's assessment of Rule 23(a)'s enumerated elements, namely: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy. Nor does the text of Rule 23(b) require administrative feasibility. Rather, administrative feasibility is one of many relevant criterion that district courts balance under the manageability inquiry of Rule 23(b)(3). Accordingly, the Eleventh Circuit held "that administrative feasibility is not a requirement for certification under Rule 23," and ascertainability is limited "to its traditional scope: a proposed class is ascertainable if it is adequately defined such that its membership is capable of determination." 2021 WL 346121, at *5.

Further clarifying the role of administrative feasibility, the Eleventh Circuit directed district courts to evaluate proposed classes under Rule 23(b)(3) by considering (1) whether a class action would create more manageability problems than its alternatives, and (2) how the manageability concerns compare with the other advantages or disadvantages of a class action. Under this framework, administrative feasibility will rarely be dispositive of class certification.

Finally, the Eleventh Circuit reiterated that federal jurisdiction under CAFA does not depend on certification. The district court erred in dismissing the case and should have retained jurisdiction even after denying class certification.