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California Supreme Court adopts Seventh Circuit's "weak" view of ascertainability

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Takeaway: The ascertainability requirement for class actions has divided both California and federal appellate courts. In *Noel v. Thrifty Payless, Inc.,* --- P.3d ----, No. S246490, 2019 WL 3403895 (CA July 29, 2019), the California Supreme Court surveyed the ascertainability landscape under both California and federal law, electing to follow the less-stringent approach, thereby making it easier to secure class certification in California state court. The Supreme Court adopted the Seventh Circuit's view because (among other reasons) the more stringent view makes class certification difficult if not impossible in low-value consumer class actions. In the typical consumer case, a class representative, even after discovery, likely cannot develop evidence showing that individual class members could be specifically identified and then served with class notice. The *Noel* decision thus eliminates or minimizes an ascertainability barrier to class certification, especially where a class list cannot be developed through discovery, and thus gives class members the opportunity to later "self-identify" based on objective characteristics set out in a class definition.

In *Noel*, James Noel purchased an inflatable outdoor pool from a Rite Aid drugstore in San Rafael, California for $59.99. His purchase was apparently influenced by a photograph on the packaging showing that the pool was much bigger than the pool inside the packaging. In November 2013, he filed suit in California state court, asserting claims under California's unfair competition law, false advertising law, and the Consumers Legal Remedies Act.

He moved for class certification, but his motion was denied. According to the superior court, it had no choice but to deny the motion because Mr. Noel presented no evidence addressing the ascertainability requirement. In the court's view, Mr. Noel needed to present evidence showing how individual class members could be identified for the purpose of providing them with class notice.

The Court of Appeal affirmed, ruling: "While Noel was not required to actually identify the 20,000-plus individuals who bought pools, his failure to come up with any means of identifying them was a legitimate basis for denying class certification." *Id*. at *3.

The Supreme Court granted review "to clarify what the ascertainability requirement for class certification involves." *Id*. at *4. The court started by reviewing California case law, noting, among other things, that the intermediate appellate courts "ha[d] developed two basic views of the ascertainability requirement." *Id*. at *9.

The less-demanding view focused on the class definition and "regards a class as ascertainable when it is defined 'in terms of objective characteristics and common transactional facts' that make 'the ultimate identification of class members possible when that identification becomes necessary.'" *Id.* (quoting *Hicks v. Kaufman & Broad Home Corp*., 89 Cal.App.4th 908, 915 (Cal. Ct. App. 2001)).

The "more exacting view" required "an examination into '(1) the class definition, (2) the size of the class

and (3) the means of identifying class members." *Id*. (citation omitted). Certain courts applying this view have ruled that class members should be capable of identification "without unreasonable expense or time by reference to official records," and some "have gone further and required a class plaintiff to make a specific factual or evidentiary showing in order to show an ascertainable class." *Id*. (citation omitted).

The California Supreme Court then examined the federal law in this area, comparing the "stringent view" of ascertainability espoused by the Third Circuit with the "narrower," "weak," and "relatively uncontroversial" version of ascertainability espoused by the Seventh Circuit. *Id*. at *10-*11.

Under the Third Circuit's stringent view, "a plaintiff seeking class certification under Rule 23(b)(3) must show not only that the class has been 'defined with reference to objective criteria,' but also that there is 'a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.'" *Id*. at *10 (quoting *Hayes v. Wal-Mart Stores, Inc*., 725 F.3d 349, 355 (3d Cir. 2013)). Courts applying this view have denied class certification in low-value consumer class actions, where consumers would have paid for products in cash (and likely would not have retained receipts of purchase) and a list of class members could not be generated from the business records of the class defendant.

The Seventh Circuit's "narrower" or "weak" version of ascertainability simply requires that "'classes be defined clearly and based on objective criteria.'" *Id*. at *11 (quoting *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 659 (7th Cir. 2015)). In adopting this view, the Seventh Circuit considered the Third Circuit's more demanding view and rejected it, ruling that the Third Circuit's formulation "'does not further any interest of Rule 23 that is not already adequately protected by the Rule's explicit requirements. On the other side of the balance, the costs of imposing the requirement are substantial. The stringent version of ascertainability effectively bars low-value consumer class actions, at least where plaintiffs do not have documentary proof of purchases, and sometimes even when they do.'" *Id*. at *11 (quoting *Mullins*, 795 F.3d at 662).

Under the Seventh Circuit view, ascertainability is evaluated through the lens of the "manageability" requirement. *See* Fed. R. Civ. P. 23(b)(3)(D) (requiring a district court, in evaluating predominance and superiority, to examine "the likely difficulties in managing a class action"). This approach gives a district court the ability to evaluate both the costs and benefits of maintaining a class action, whereas under the Third Circuit view, ascertainability is viewed "'in a vacuum, considering only the administrative costs and headaches of proceeding as a class action.'" *Id.* at *12 (quoting *Mullins*, 795 F.3d at 663).

The California Supreme Court sided with the Seventh Circuit, stating that "we agree with *Mullins*' assignment of a limited but important function to the ascertainability requirement." *Id*. at *13. That led the court to endorse the less-demanding standard adopted by certain California intermediate appellate courts (a standard similar to the Seventh Circuit's view), concluding "that the objectives of [the ascertainability] requirement are best achieved by regarding a class as ascertainable when it is defined 'in terms of objective characteristics and common transactional facts' that make 'the ultimate identification of class members possible when that identification becomes necessary.'" *Id*. (quoting *Hicks*, 89 Cal.App.4th at 915).

Further, in rejecting the more demanding view adopted by other California courts, the California Supreme Court observed that courts demanding that approach believed they were doing absent class members a favor, given that absent class members who do not opt out are bound by the *res judicata*

effect of a class judgment. But the court observed that this view did more harm than good:“Thus the true choice in this case is not between a single class action . . . and multiple individual actions pressing similar claims; it is between a class action and no lawsuits being brought at all. Under the circumstances, due process may not demand personal notice to individual class members, and to build a contrary assumption into the ascertainability requirement would be a mistake.”*Id.* at *16.

Having adopted a less demanding ascertainability requirement, the Supreme Court reversed the judgment of the Court of Appeal (which had upheld the superior court's denial of class certification) and expressly disapproved the multiple California decisions adopting the more demanding standard.