SEPTEMBER 30, 2020

Third Circuit weakens ascertainability requirement by lowering evidentiary bar

by James F. Bogan III

Takeaway: The Circuits have split on the issue of whether a class representative must show the class is "ascertainable." The Third Circuit has required a Rule 23(b)(3) class to be "currently and readily ascertainable." *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012). While the holding in *Marcus* generally has been considered pro-defendant, a recent Third Circuit decision weakened the ascertainability requirement, allowing it to be satisfied as "a matter of just and reasonable inference" where gaps in record-keeping can be attributed to a class defendant. *Hargrove v. Sleepy's LLC* , __ F.3d __, No. 19-2809, 2020 WL 5405596, at *2 (3d Cir. Sept. 9, 2020) (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1040 (2016)).

In *Hargrove*, drivers for Sleepy's, a mattress retailer, filed a putative class action against Sleepy's, alleging Sleepy's misclassified them as independent contractors when they should have been classified as employees. The plaintiffs sought the certification of a class of Sleepy's delivery drivers over a class period extending from 2007 to 2016, further arguing that the class members could be ascertained from logs maintained by Sleepy's.

But the class plaintiffs had only obtained the logs for a very small portion of the class period (for a few months in 2008 and 2009), and the logs they presented were missing data. For that reason, the district court ruled the plaintiffs had failed to prove the class was ascertainable.

The plaintiffs appealed and the Third Circuit, in a 2-1 decision, reversed. The majority (Judges Ambro and Restrepo) concluded that Sleepy's had failed to maintain records it was required to keep by law, and that class plaintiffs should not be penalized for that failure. In so ruling, the panel extended Supreme Court precedent to the Third Circuit's ascertainability requirement, in particular the Supreme Court's decision in 2016 in *Tyson Foods*.

In *Tyson Foods*, a case brought under the Fair Labor Standards Act (FLSA), the Supreme Court discussed the important public policy embodied in the FLSA and held that employees asserting wage claims should not be penalized by an employer's failure to maintain records required to kept by law. In such a case, employees can satisfy their burden of proof by producing sufficient evidence to show the amount of their work as "a matter of just and reasonable inference." *Hargrove*, 2020 WL 5405596, at *2 (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1040 (2016)). The majority held the plaintiffs in Sleepy's had met their burden to show ascertainability, given other forms of evidence presented along with the logs, and given that plaintiffs are generally not required to actually *identify* all class members at the class certification stage – they only are required to show that class members *can* be identified.

Judge Hardiman dissented, concluding that the district court did not abuse its discretion in ruling that the plaintiffs had failed to satisfy their burden of showing that a class was "currently and readily ascertainable." He also faulted the majority for extending *Tyson Foods* to the ascertainability

requirement. In *Tyson Foods*, there was no doubt that the plaintiffs in that case were actually employees. Sleepy's, on the other hand, was reasonable in its belief that the drivers were independent contractors, and could not fairly be faulted for failing to maintain the sorts of employee records the law requires an employer to keep. See *Hargrove*, 2020 WL 5405596, at *16 (Hardiman, J., dissenting).