

California Supreme Court Poised to Provide Guidance on Ascertainability in Class Actions

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Monday, April 22, 2019

On May 8, 2019, the California Supreme Court will hear oral argument regarding an important issue involving class certification in California state courts: how to apply the requirement of ascertainability in the class certification analysis.

Unlike in federal courts—where the issue of ascertainability is unsettled— it is well-established in California that a plaintiff seeking class certification must prove that the proposed class is ascertainable. California appellate courts, however, differ on what is sufficient to meet ascertainability at the class certification stage. In *Noel v. Thrifty Payless, Inc.*, the California Supreme Court appears poised to answer whether ascertainability requires a plaintiff to demonstrate at the class certification stage that records actually exist sufficient to identify class members and to provide them notice, or if ascertainability is satisfied simply by defining the class in terms of objective and common characteristics sufficient to allow members of the class to identify themselves as having a right to recover based on the definition, leaving the ultimate identification of class members for a time after certification.

In *Noel*, plaintiffs alleged defendants violated California's Unfair Competition Law, False Advertising Law, and Consumers Legal Remedies Act by falsely advertising an inflatable pool as being larger than it was. They sought to certify a class of "all persons who purchased the Ready Set Pool at a Rite Aid store in California within the four years preceding the date of the filing of this action." The Court of Appeal

affirmed the trial court's denial of class certification, finding that plaintiffs failed to demonstrate ascertainability because they failed to offer evidence or establish a "realistic way" to clearly identify and notify purchasers of the pools.

The *Noel* court recognized that its decision conflicted with *Aguirre v. Amscan Holdings, Inc.*, in which a different Court of Appeal held that plaintiff need not demonstrate at the class certification stage a "means of identifying class members" sufficient to provide them with personal notice. Instead, according to *Aguirre*, it is sufficient for a plaintiff to "define the class in terms of objective characteristics and common transactional facts making the ultimate identification of class members possible when that identification becomes necessary." In distinguishing *Aguirre*, *Noel* noted that *Aguirre's* approach—to dispense entirely with the requirement of identifying class members at the certification stage—risks undermining the due process protections afforded to the class by providing personal notice.

Given the split among the appellate courts, it is not surprising that the California Supreme Court granted review in *Noel*. The specific issue on review is: "Must a plaintiff seeking class certification under Code of Civil Procedure section 382 or the Consumer Legal Remedies Act demonstrate that records exist permitting the identification of class members?" Therefore, it seems likely that the California Supreme Court will shed light on what state-court plaintiffs must prove and whether defendants can raise the ascertainability hurdle at the class certification stage.

In addition to providing much-needed guidance on an important issue of California class action jurisprudence, the California Supreme Court's decision could have a residual effect on a plaintiff's decision to file in federal versus state court and a defendant's decision whether to remove to federal court. To date, the U.S. Supreme Court has yet to address ascertainability, resulting in a circuit split. For California litigants, it is important to know that the Ninth Circuit has joined the Second, Fifth, Sixth, Seventh, and Eighth Circuits in finding that there is no separate class certification requirement in federal court that a plaintiff demonstrate that a class can be ascertained via an administratively feasible method or procedure. Depending on the outcome in *Noel*, a California plaintiff may look to avoid the ascertainability requirement at the class certification stage by filing in federal court. On the other hand, if the Court of Appeal decision in *Noel* is affirmed, a defendant may elect to stay in California state court to take advantage of an additional defense to class certification unavailable in the Ninth Circuit, at least for now.

We are closely monitoring the case, and we will provide updates after oral argument and after a decision.

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