A CHILLY RECEPTION AT THE 11TH CIRCUIT: THE COURT NARROWS THE SCOPE OF THE ASCERTAINABILITY REQUIREMENT FOR CLASS CERTIFICATION

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INTRODUCTION

What do you get when you cross allegedly defective refrigerators, a dangerous chemical agent, and a hotly contested topic in class action practice? The answer is: a precedential opinion from the U.S. Court of Appeals for the 11th Circuit that clarifies the boundaries of the ascertainability requirement and minimizes the role of "administrative feasibility" considerations in the class certification analysis.

In *Cherry v. Dometic Corp.*, the 11th Circuit held that "the existence of an administratively feasible method to identify absent class members" is not "a precondition for certification of a class under Federal Rule of Civil Procedure 23."[1] The court, however, did not discount the importance of "administrative feasibility" in the certification analysis, ruling that district courts "may consider administrative feasibility as one factor among several under Rule 23(b)(3)."[2] The *Cherry* decision may narrow the application of ascertainability in the 11th Circuit, but it does not entirely retire or put administrative feasibility considerations on ice. Although now watered down, entities faced with class actions in the 11th Circuit may still defend against certification by arguing that identifying class members is infeasible, unmanageable, or riddled with individual questions. Such classes may not satisfy the predominance and superiority requirements of Rule 23(b)(3).

BACKGROUND

The *Cherry* case arises from allegations of design defects in defendant's gas-absorption refrigerators, which defendant designed for use in recreational vehicles. To serve that use, the refrigerators utilize a chemical solution to ensure that the refrigerators remain operative without electricity. Enter the 18 named plaintiffs, who allege that design defects exacerbate the risk of dangerous chemical leaks and limit the refrigerator's functional life.[3]

Plaintiffs moved to certify a class defined to include "all persons who purchased in selected states certain models of [defendant's] refrigerators that were built since 1997."[4] The U.S. District Court for the Southern District of Florida denied plaintiffs' motion, finding that they failed to demonstrate an administratively feasible method for identifying members of the proposed class and, therefore, did not establish the existence of an ascertainable class.[5] Plaintiffs appealed.

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THE 11TH CIRCUIT WATERS DOWN ITS APPROACH TO ASCERTAINABILITY

On appeal, the 11th Circuit considered whether administrative feasibility is a precondition for class certification, either as an element of ascertainability or otherwise. In addressing this issue, the 11th Circuit did not write on a blank canvas. To the contrary, the court identified ascertainability as "'[o]ne of the most hotly contested issues in class action practice today'" and detailed the split approaches taken by other circuit courts of appeal.[6] In particular, the court contrasted the "heightened" ascertainability standard championed by the 3rd Circuit, among others, which requires proof of administrative feasibility at the outset of the certification analysis, with more lenient standards followed by other circuits, which relegate the feasibility of identifying class members to the predominance and superiority requirements of Rule 23(b)(3).[7]

Prior to *Cherry*, the 11th Circuit, in unpublished decisions, had signaled approval of a heightened standard that requires a plaintiff to "propose an administratively feasible method by which class members can be identified."[8] The *Cherry* court, however, rejected those unpublished decisions as non-binding, freeing the *Cherry* court to undertake its own analysis with few precedential limitations and a growing body of case-law from other circuits.[9]

The court first addressed binding precedent, reaffirming that a plaintiff seeking certification of a class must satisfy the implicit, threshold requirement of ascertainability. That precedent, however, demands only that a plaintiff show that the proposed class is "'adequately defined and clearly ascertainable.'"[10] According to the court, neither its prior (binding) cases nor the "inherent aspect[s] of ascertainability" require proof of an administratively feasible method for identifying class members.[11] Instead, the 11th Circuit explained, members of the class need only be "capable of being determined" and "membership can be capable of determination without being capable of *convenient* determination."[12]

The court next turned to the text of Rule 23. According to the court, an administrative feasibility element is not expressly or implicitly evident in the text of Rule 23(a), has no connection to the Rule 23(a) factors, and, therefore, such a showing "is not part of the ascertainability inquiry."[13] The court similarly found that an administrative feasibility requirement does not "follow from Rule 23(b)."[14] At the same time, the 11th Circuit explains that administrative feasibility nevertheless "has relevance for Rule 23(b)(3) classes, in light of the manageability criterion of" the predominance and superiority requirements.[15] Indeed, the court acknowledged that, "a difficulty in identifying class members is a difficulty in managing a class action" and that if "unusually difficult manageability problems" are evident, the court may refuse to certify or, if it has already certified a class that later proves unmanageable, decertify the class.[16]

In sum, the 11th Circuit described its ascertainability-related holdings as follows:

- "[A]dministrative feasibility is not a requirement for certification under Rule 23"; and
- Ascertainability is limited "to its traditional scope," which requires only that a proposed class be "adequately defined such that its membership is capable of determination."[17]

As to the feasibility of identifying class members, the court instructed that courts "may consider administrative feasibility as part of the manageability criterion of Rule 23(b)(3)(D), but cautioned that, "[a]dministrative feasibility alone will rarely, if ever, be dispositive."[18] The 11th Circuit further advised district courts to "evaluate this issue in comparative terms[,]" by asking "would a class action create more manageability problems than its alternatives"

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and "how do the manageability concerns compare with the other advantages or disadvantages of a class action."[19]

CONCLUSION

Over the past decade, the circuit courts of appeal have wrestled with the contours and role of ascertainability in the class certification analysis. The results have varied, leaving practitioners with a patchwork of ever-evolving standards that differ based largely on the geographic location of a case. For example, a plaintiff in federal court in Philadelphia must demonstrate an administratively feasible method for identifying members of a proposed class as a precondition to certification, whereas a plaintiff in federal court in San Francisco may succeed on a motion for class certification without showing either administrative feasibility or ascertainability. The implications of this are obvious. The 11th Circuit's decision in *Cherry* exemplifies the uncertainty surrounding the application of ascertainability and the need for the U.S. Supreme Court to intervene.[20]

FOOTNOTES

[1] Cherry v. Dometic Corp., — F.3d —, 2021 WL 346121, at *1 (11th Cir. Feb. 2, 2021).

[2] *Id.* at *2.

[3] *See id.* at *1.

[4] *Id.*

[5] *Id.* at *2.

[6] *Id.* at *3 (quoting Rhonda Wasserman, *Ascertainability: Prose, Policy, and Process*, 50 CONN. L. REV. 695, 697-99 (2018)).

[7] *See id.* (discussing the circuit split). For additional information regarding this circuit split, *see* Robert W. Sparkes, III, *Revisiting Ascertainability: The Ninth Circuit Court of Appeals Weighs in on "Ascertainability" for Class Certification*, K&L Gates HUB (Jan. 19, 2017); Robert W. Sparkes, III, *Grasping for a Hold on "Ascertainability": The Implicit Requirement for Class Certification and its Evolving Application*, K&L Gates HUB (Aug. 26, 2015).

[8] Karhu v. Vital Pharms., Inc., 621 F. App'x 945, 947-48 (11th Cir. 2015) (unpublished decision); *see also* Bussey v. Macon Cty. Greyhound Park, Inc., 562 F. App'x 782, 788 (11th Cir. 2014) (unpublished decision) (approving ascertainability condition that required a plaintiff prove "that identifying class members is a manageable process that does not require much, if any, individual inquiry" (internal quotation marks omitted)).

[9] *See Cherry,* 2021 WL 346121, at *3 ("We have addressed the issue only in unpublished decisions that applied the heightened standard of the Third Circuit . . . but those decisions do not bind us as precedent").

[10] *Id.* (quoting Little v. T-Mobile USA, Inc., 691 F.3d 1302, 1304 (11th Cir. 2012)).

[11] *Id.*

[12] *Id.* (internal quotation marks omitted) (emphasis in original).

[13] *Id.*

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[14] *Id.* at *5

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] Notably, the Supreme Court has passed on opportunities to address ascertainability at least four times in recent years (*see* ConAgra Brands, Inc. v. Briseno, 138 S. Ct. 313, 313 (2017); Procter & Gamble Co. v. Rikos, 136 S. Ct. 1493, 1493 (2016); Direct Dig., Inc. v. Mullins, 136 S. Ct. 1161, 1162 (2016); Martin v. Pac. Parking Sys., Inc., 135 S. Ct. 962, 962 (2015)) and at least one other petition was voluntarily dismissed before the Supreme Court ruled on it (*see* Petroleo Brasileiro S.A. v. Univ. Superannuation Scheme Ltd., No. 17-664 (2017)).

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