California State and Federal Courts Have Different Class Certification Rules on Whether Putative Classmembers Must Be Ascertainable

By Courtney C. Wenrick[i] and Scott J. Hyman[ii]

Let's say that, unfortunately, you've been served with a class action complaint in a California superior court. As a defendant, your initial reflexive inclination might be to remove the action to federal district court because you perceive certain advantages afforded by the federal rules, by Article III judges, or by hands-on litigation management in the district courts.

But, wait a moment – it's *California*, where dogs lie down with cats, right is left, and, oftentimes, the most obvious is obscure. Two recent, conflicting decisions from the federal Ninth Circuit Court of Appeals and the California Court of Appeal illustrate that point, creating yet another difference between state and federal practice that parties and their counsel must consider in deciding whether to remove a class action from state to federal court. The difference this time involves whether a class may be certified without proof of ascertainability.

In *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1131-32 (9th Cir. 2017), the Ninth Circuit Court of Appeals held that a class action plaintiff does *not* have to show, as part of its burden of getting a class certified, that it is possible to identify class members. Said the court: "We have never interpreted Rule 23 to require…a showing [of ascertainability], and, like the Sixth, Seventh, and Eighth Circuits, we decline to do so now."[1]

California's First District Court of Appeal recently reached the opposite conclusion in *Noel v. Thrifty Payless, Inc.*, ___ Cal.App.5th ___, 2017 WL 5988837, at *6 (No. A143026; Dec. 4, 2017). According to *Noel*, to obtain class certification in California state court, a plaintiff must still prove class members are ascertainable.

So, if you are sued in California state court, should you stay or should you go?[2] If it will be difficult for the plaintiff to prove ascertainability, staying in state court may prove beneficial. Class action defendants should at least consider the ascertainability question as part their overall decisionmaking process on whether to remove a class action from a California state court to federal court.

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[1] *Briseno*, 844 F.3d at 1123.

[2] The Clash, "Should I Stay or Should I Go", Combat Rock (Epic Records, 1982).

In *Noel*, 2017 WL 5988837, at *6, the Court of Appeal affirmed a state superior court's denial of class certification on ascertainability grounds when a class action plaintiff could not provide a means of identifying potential class members. The plaintiff sought to represent a putative class of similarly situated persons who had been misled about the size of an inflatable swimming pool by a picture of the pool on the box in which it came. *Id.* at *1. Applying the three-factor standard outlined in *Sotelo v. MediaNews Group Inc.*,[3] the California Court of Appeal affirmed denial of class certification, finding that Noel had not proposed any means of identifying class members, nor produced any evidence to show how the defendant's records could be used to identify individuals who actually purchased the allegedly undersized pools. *Noel*, 2017 WL 5988837, at *5, 6. Hence, Noel did not show that there was a means of identifying – *i.e.* "ascertaining" – putative class members. *Id.*

The Court of Appeal also rejected Noel's claim that a class could be notified through the defendant Rite Aid's rewards program email list or other broadcast or publication notification.[4] Noel provided no means for Rite Aid's rewards list to be cross-referenced with other documentation to determine who actually purchased a pool. Since Noel could not come up with a means of notice that would have resulted in the vast majority of those being notified actually being class members, he could not meet the due process requirements of class notification and fair class administration. *Noel*, 2017 WL 5988837, at *7 (*citing Medrazo v. Honda of North Hollywood*, 166 Cal. App. 4th 89, 101 (2008)).

In stark contrast to *Noel*'s interpretation of the California Code of Civil Procedure and class-certification jurisprudence, the Ninth Circuit held in *Briseno*, 844 F.3d at 1131-32, that proof of ascertainability is not a prerequisite for class certification under Federal Rule of Civil Procedure 23.[5] In *Briseno*, the defendant, ConAgra, argued that there was no administratively feasible means of identifying class members who had purchased cooking oil labeled "100% Natural" over many years in eleven states. *Id.* at 1123. ConAgra urged that consumers would not be able to reliably remember their cooking oil purchases, nor were they likely to have retained receipts, and so could not self-identify as class members. Looking to the plain language of

[3] "The ascertainability requirement is a due process safeguard, ensuring that notice can be provided 'to putative class members as to whom the judgment in the action will be res judicata.' 'Class members are "ascertainable" where they may be readily identified without unreasonable expense or time by reference to official records.' In determining whether a class is ascertainable, the trial court examines the class definition, the size of the class and the means of identifying class members." *Sotelo v. MediaNews Group. Inc.*, 207 Cal. App. 4th , 639, 647-48 (2012) (citations omitted).

[4] The court also rejected Noel's attempts to limit the *Sotelo* ascertainability standard to employment actions only. *Noel*, 2017 WL 5988837, at *7.

[5] *See also Meyer v. Bebe Stores, Inc.*, No. 14-cv-00267-YGR, 2017 WL 558017, at *3-4 (N.D. Cal. Feb. 10, 2017); *Del Valle v. Glob. Exch. Vacation Club*, 320 F.R.D. 50, 56 (C.D. Cal. 2017).

Rule 23, the Ninth Circuit Court of Appeals held that "[w]e have never interpreted Rule 23 to require…a showing [of ascertainability], and, like the Sixth, Seventh, and Eighth Circuits, we decline to do so now".[6] In systematically dismissing the reasoning of the Third Circuit, the Ninth Circuit found that the manageability criterion under Rule 23(b)(3) provides sufficient protection and that there was no need to read additional requirements into Rule 23.

Many different types of class actions place ascertainability directly at issue. For example, plaintiffs in Telephone Consumer Protection Act class actions alleging that an autodialer called the wrong telephone number often have problems ascertaining the putative class members because a defendant might not have the means to identify such persons on a systematic basis, or absent a file-by-file review to find such information.

Before removing a class action to federal court, a defendant should carefully consider whether removal might smooth the plaintiff's road to class certification under the *Briseno's* more plaintiff-friendly rule, dispensing with any ascertainability requirement.

For questions regarding the effect of state and federal ascertainability rules on class actions, please contact Courtney C. Wenrick at ccw@severson.com or Scott J. Hyman at sjh@severson.com.

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[6] *Id.* This standard differs from the one in the Eleventh Circuit, for example, which does not permit consumers to submit affidavits self-identifying as class members to meet the ascertainability requirement as that would result in mini-trials. *Karhu v. Vital Pharmaceuticals, Inc.*, 621 Fed. Appx. 945, 947-48 (11th Cir. 2015).

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