

Circuit Split on Class Feasibility Offers Defense Opportunities

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Defense counsel tend to see individualized issues of fact and law when litigating a class action. Plaintiffs counsel, on the other hand, will often look at those same issues and suggest that they apply uniformly across the entire purported class, with little variation.

What both sides can agree on, though, is that Federal Rule of Civil Procedure 23 provides fertile ground to disagree over these issues. In recent years, one of the most fertile areas of disagreement has been the role that “administrative feasibility” plays in a court’s decision to certify a purported class — or not.

And the disagreement is not limited to the litigants. Circuit courts nationwide have come out on opposite sides of the administrative feasibility debate. Last month, the U.S. Court of Appeals for the Eleventh Circuit waded into the fray when it issued a published decision in *Cherry v. Dometic Corp.*, which clarified the Eleventh Circuit’s stance on administrative feasibility.

In *Cherry*, the Eleventh Circuit held that courts may consider whether the named plaintiff has demonstrated an administratively feasible method for identifying class members when addressing a motion for class certification, but administrative feasibility is not a stand-alone requirement under Rule 23. In reaching its decision, the Eleventh Circuit planted itself firmly into the existing circuit split on the issue.

Three circuits have now issued published opinions — and the Eleventh Circuit had previously issued two unpublished opinions — requiring putative class members to establish administrative feasibility before finding that a proposed class is ascertainable. Several circuits, however, including the Eleventh Circuit in *Cherry*, have held that administrative feasibility is a factor on class certification, but not dispositive.

The existing circuit split creates significant strategic opportunities for practitioners to consider when litigating a class action — both early in the case and throughout the lawsuit.

At the outset of the case, defendants who are facing a class action will likely want to explore whether it would be possible to transfer the case to a circuit that views administrative feasibility as a high bar to class certification. And, once the case is underway, practitioners will likely need to tailor their class certification strategy to focus more on administrative feasibility as an element of ascertainability in some jurisdictions — while perhaps focusing more closely on other elements of Rule 23 in other jurisdictions.

It remains to be seen whether the U.S. Supreme Court will throw its hat in the ring. But, until then, administrative feasibility will be a hot item in class action practice.

Background on Administrative Feasibility

Rule 23 contains an implicit requirement that members of a proposed class be ascertainable. Ascertainability requires that, at the very least, plaintiffs clearly define the class through objective criteria, so that class members can be identified.

It may, however, also require administrative feasibility — meaning there must be a reliable and manageable process for determining whether purported class members meet these objective criteria. In recent years, courts have disagreed on whether administrative feasibility should be considered a prerequisite to class certification as part of the ascertainability requirement, or, instead, whether it is simply a factor for courts to consider when evaluating the elements of Rule 23.

Courts that hold administrative feasibility is a prerequisite to class certification require plaintiffs counsel to show that members of the class can be identified without a significant amount of investigation into each class member's circumstances. This is known as the heightened standard.

Courts that hold administrative feasibility is not a prerequisite generally consider the class definition when determining class certification under Rule 23(a), but still consider administrative feasibility when applying the Rule 23(b)(3)(D) balancing test. This is known as the less rigorous standard.

The U.S. Court of Appeals for the Third Circuit's 2013 decision in *Carrera v. Bayer Corp.*, and the U.S. Court of Appeals for the Seventh Circuit's 2015 decision in *Mullins v. Direct Digital LLC*, are indicative of the circuit split. The Third Circuit applied the heightened standard in *Carrera*, concluding that a class is not ascertainable unless there is a manageable process for identifying class members that does not require much, if any, individual factual inquiry.

In *Mullins*, the Seventh Circuit applied the less rigorous standard, which analyzes administrative feasibility as an element of the Rule 23(b)(3) factors, but not as a stand-alone requirement of ascertainability. Since that time, the majority of circuits have firmly taken sides, whereas the Eleventh Circuit has vacillated somewhat in various decisions, until issuing *Cherry* this month.

Cherry Background

In *Cherry*, at the U.S. District Court for the Southern District of Florida, the main issue on class certification was whether the proposed class satisfied the ascertainability requirement of Rule 23(a). The class representatives framed ascertainability as an issue of class definition only, thereby applying the less rigorous standard.

They argued that “the proposed class is ascertainable because the class definition relies exclusively on objective criteria.” They also nominally argued that, in any event, class member identification would be administratively feasible, citing *Briseno v. ConAgra Foods Inc.*, a 2017 opinion from the U.S. Court of Appeals for the Ninth Circuit rejecting administrative feasibility as a prerequisite to class certification.

In contrast, the defendant argued for the heightened standard — i.e., that proof of administrative feasibility is required, which the class representatives failed to establish because they provided no evidence that their method of identification would be workable. The district court agreed with the defendant and denied class certification.

Eleventh Circuit Decision

The Eleventh Circuit began its analysis by addressing other circuit holdings regarding the role of administrative feasibility. The court noted that the Third Circuit applies a heightened standard, which analyzes administrative feasibility as a prerequisite to certification, with the U.S. Court of Appeals for the First Circuit and the U.S. Court of Appeals for the Fourth Circuit following this approach.

In contrast, the *Cherry* court noted that the U.S. Court of Appeals for the Second Circuit, the U.S. Court of Appeals for the Sixth Circuit, the U.S. Court of Appeals for the Eighth Circuit, and the Seventh and Ninth Circuits look at administrative feasibility as part of a greater multi-factor analysis.

Given the variance in the law, the *Cherry* court looked to the text of Rule 23(a) and (b). In doing so, the court noted that “ascertainability” was nowhere to be found in Rule 23(a)’s language, yet it was an implied prerequisite of Rule 23(a). The court, however, found no such implication for administrative feasibility in Rule 23(a).

According to the court, an administrative feasibility requirement “does not follow from the text of Rule 23(a),” contending that administrative feasibility is not essential to any of the elements of Rule 23(a): qualifications of the putative class members, the typicality of claims and defense, the practicability of joinder of class members, or common questions of law and fact.

Rule 23(b), however, was a different story. The court found administrative feasibility relevant when considering class certification under Rule 23(b)(3). Citing its 2004 opinion in *Klay v. Humana Inc.*, the court stated that Rule 23(b)(3)(D) requires a balancing test to assess the manageability of the class.

As such, “[a] difficulty in identifying class members [or administrative feasibility] is a difficulty in managing a class action.” Administrative feasibility, therefore, remains relevant when determining whether to certify a class under Rule 23(b)(3) — although it is not a stand-alone requirement under ascertainability in the Eleventh Circuit.

Given its analysis, the court ultimately vacated the district court’s denial of class certification, and remanded for further proceedings. It remains to be seen whether the defendant will seek *en banc* review in the Eleventh Circuit.

The Split

In less than 10 years, circuit courts have become divided on the role of administrative feasibility. Some courts view administrative feasibility as a staunch prerequisite to class certification, while others view it as one of many factors courts are to consider under Rule 23(b)(3). The chart below details some of the recent decisions on this issue, as well as the standard each court applies:

Circuit	Cases	Standard
First Circuit	<i>In re Nexium Antitrust Litig.</i> , 777 F.3d 9 (1st Cir. 2015)	Heightened

Second Circuit	<i>In re Petrobas Sec.</i> , 862 F.3d 250 (2d Cir. 2017); <i>Brecher v. Republic of Argentina</i> , 802 F.3d 303 (2d Cir. 2015)	Less rigorous
Third Circuit	<i>Byrd v. Aaron's Inc.</i> , 784 F.3d 154 (3d Cir. 2015); <i>Carrera v. Bayer Corp.</i> , 727 F.3d 300 (3d Cir. 2013)	Heightened
Fourth Circuit	<i>EQT Prod. Co. v. Adair</i> , 764 F.3d 347 (4th Cir. 2014)	Heightened
Fifth Circuit	<i>Seeligson v. Devon Energy Prod. Co.</i> , 761 Fed. App'x 329 (5th Cir. 2019)	Less rigorous
Sixth Circuit	<i>Rikos v. Proctor & Gamble Co.</i> , 799 F.3d 497 (6th Cir. 2015)	Less rigorous
Seventh Circuit	<i>Mullins v. Direct Digital LLC</i> , 795 F.3d 654 (7th Cir. 2015), cert denied, 136 S. Ct. 1161 (2016)	Less rigorous
Eighth Circuit	<i>Sandusky Wellness Ctr. LLC v. Medtox Sci. Inc.</i> , 821 F.3d 992 (8th Cir. 2016)	Less rigorous
Ninth Circuit	<i>Briseno v. ConAgra Foods Inc.</i> , 844 F.3d 1121 (9th Cir. 2017)	Less rigorous
Eleventh Circuit	<i>Cherry v. Dometic Corp.</i> , No. 19-13242, ___ F.3d ___ (11th Cir. Feb. 2, 2021)	Less rigorous

At some point, the Supreme Court may step in to resolve the split. When the Supreme Court declined review of the Seventh Circuit's decision in *Mullins* in 2016, less than half of the circuits had published opinions on the issue of administrative feasibility. With the Eleventh Circuit's decision in *Cherry*, nine circuits now have differing published opinions, with one other circuit offering an unpublished opinion.

Moving Forward

The existing circuit split creates significant strategic opportunities for practitioners to consider when defending a class action. For example, practitioners may be inclined to take a stronger look at transferring a case to a heightened standard circuit, if there is a plausible argument that a less rigorous standard circuit is improper or inconvenient.

And once the case is underway, practitioners will likely tailor their arguments at class certification to play to the strengths or weaknesses of the forum. In a heightened standard forum, defense counsel may be more inclined to focus heavily on administrative feasibility as a formidable obstacle to ascertainability under Rule 23(a). In a less rigorous standard forum, defense counsel will likely focus more on how a lack of administrative feasibility undermines Rule 23(b)(3) factors such as predominance, superiority and manageability.

For example, even if a class definition is objective and potentially ascertainable, the individual issues that go into identifying class members and resolving their claims may make certification improper because litigating as a class is an inferior method of adjudication. Under either standard, administrative feasibility remains an issue.

How that issue plays out will depend on skilled counsel and the facts and circumstances of the case. Either way, counsel should be prepared to pivot should the Supreme Court decide to resolve the current circuit split.

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