A new class ascertainability standard

By Jeremy K. Robinson

On July 29, in *Noel v. Thrifty Payless, Inc.*, 2019 DJDAR 7074, the California Supreme Court announced the test for class "ascertainability" under California law: A class is ascertainable when it "defines the class in terms of objective characteristics and common transactional facts that make the ultimate identification of class members possible when that identification becomes necessary."

To the observer outside the class action realm, this might seem like an answer in search of a question and unworthy of Supreme Court review. But defining the role of ascertainability in class certification has confounded courts and led to several different tests. In *Noel*, the Supreme Court resolved a split among the appellate courts in California, who had devised two different formulations. And, this divergence wasn't merely academic — the more stringent of the two tests often proved insurmountable and thus fatal for class certification.

Noel was a consumer class action brought under the Unfair Competition Law, the False Advertising Law and the Consumers Legal Remedies Act. The complaint alleged the packaging of an inflatable pool sold at Rite Aid dramatically misrepresented the size and capacity of the pool (comparison pictures are included in the opinion and are worth looking at).

The plaintiff in *Noel* moved to certify a class defined as anyone in California who purchased the pool from Rite Aid within four years from when the case was filed. Rite Aid argued class certification should be denied because the plaintiff didn't provide evidence on how the members of the class could be identified, and the trial court agreed. The trial judge acknowledged the plaintiff's argument that Rite Aid tracks customer data for any credit card purchases, has a customer rewards program that includes contact information, and sends weekly subscriber emails and advertisements, but rejected it because the plaintiff had not conducted discovery or presented evidence on those points.

Division 4 of the 1st District Court of Appeal found no abuse of discretion, holding the plaintiff's failure to provide a means to identify the purchasers of the pool was a valid basis for denying class certification. The Court of Appeal did acknowledge some difference of opinion in the case law as to whether such a showing was required but sided with the courts requiring that showing.

The Supreme Court granted review and ultimately went in a different direction than both the trial court and the Court of Appeal. In a unanimous opinion authored by Chief Justice Tani Cantil-Sakauye, the high court held a plaintiff seeking class certification need not show how the class members will be identified. It is enough to define the class in terms of objective characteristics that make identifying them possible, even if it is through self-identification.

The court reached this conclusion after tracing the history of ascertainability through both the California and federal court systems. California was surprisingly light on pronouncements from the Supreme Court on ascertainability, with the only somewhat meaningful discussion coming more than 50 years ago in *Daar*

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v. Yellow Cab Co. But even that discussion wasn't particularly helpful on this issue.

Since *Daar*, though, California's appellate courts have filled in the gaps, coming up with two different approaches. An example of the first approach, ultimately adopted by the *Noel* court, is *Estrada v. FedEx Ground Package System, Inc.*, from the 2nd District Court of Appeal. In *Estrada*, the court found a class ascertainable "if it identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself as having a right to recover based on the description."

The other approach was exemplified in *Soltelo v. MediaNews Group, Inc.*, also from the 1st District, where the court determined, "class members are ascertainable where they may be readily identified without unreasonable expense or time by reference to official records." To make this determination, the trial court must look at the class definition, class size and means of identifying class members. This test is more exacting than the *Estrada* one, requiring plaintiffs seeking certification to "provide proof substantiating a specific mechanism or mechanisms through which class members could be identified so as to be personally notified of the class proceeding."

Turning to the federal courts, the high court noted a similar divergence of opinion, with the 3rd Circuit embracing the strict view of ascertainability and the 7th Circuit following the more lenient approach (the 9th Circuit does not have an ascertainability requirement, having subsumed that analysis into the other factors required under Rule 23 of the Federal Rules of Civil Procedure). The California Supreme Court found particularly instructive the 8th Circuit's decision in *Mullins v. Direct Digital, LLC* and adopted much of its reasoning.

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strate that class members can be identified from records and be provided personal notice: "as a rule, a representative plaintiff in a class action need not introduce evidence establishing how notice of the action will be communicated to individual class members in order to show an ascertainable class."

The court believed this to be the best way to balance the due process interests of all parties involved without unduly impairing the efficacy of the class action procedure. Several policy reasons were advanced including that due process does not require individual notice to all class members but rather only the "best notice practicable un-

der the circumstances," and that requiring class members to be identifiable from a defendant's records would effectively bar lower value class actions and would reward a defendant for inadequate record-keeping.

The court used the case before it as an example. The pool in question sold for $60 and there were about 20,000 members of the class. Since the amount at stake is relatively low for each individual class member, "the odds that any class member will bring a duplicative individual action in the future are effectively zero." So, the choice in the case is not between a single class action and many individual actions but between a class action

and no lawsuits at all. Under those circumstances, the court reasoned, due process does not demand personal notice to each individual class member.

Despite all this, the court did leave open the door for arguments about identifying class members under one of the other criteria for certification, such as whether the case is manageable. So ultimately it is possible the court just shuffled the analysis to a different section of the brief. But given the tenor of the analysis overall, it is clear the Supreme Court wants to discourage denial of class certification premised on concerns of how the class members can be individually identified.

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