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Petrobras Does Little To Clarify Class Ascertainability

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Law360, New York (July 14, 2017, 11:49 AM EDT) --

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On July 7, 2017, in In re Petrobras Securities, the Second Circuit fired the latest salvo in the class action ascertainability wars. In Petrobras, the panel purported to "clarify" the Second Circuit's leading ascertainability decision, Brecher v. Republic of Argentina, 806 F.3d 22 (2015). In reality, however, it essentially rewrote Brecher, stretching it beyond recognition to revamp the Second Circuit's law of ascertainability. The impact of Petrobras remains to be seen; indeed, its whole discussion of ascertainability is technically just dicta. One thing is for sure, however: it does little to make things "clearer" for litigants or lower courts.

Background: Two Views of "Ascertainability"

Every circuit recognizes that a putative class must satisfy an "ascertainability" test before it can be certified. The nature of that test, however, is one of the most hotly disputed questions in class action practice today.

The Third Circuit famously imposes a two-part test, which requires plaintiffs to show both (1) that their class is defined using "objective criteria" (rather than beliefs, emotions or opinions); and (2) that there is an "administratively feasible" method of determining whether a given person is a class member without "extensive and individualized fact-finding." See Carrera v. Bayer Corp., 727 F.3d 300, 305–08 (3d Cir. 2013).

Other circuits, such as the Sixth, Seventh and Ninth, have rejected the Third Circuit's two-part test. They require only that the proposed class be defined using "objective criteria" and have definite boundaries. In these circuits, it doesn't matter (at least for ascertainability purposes) whether there is a practicable way to determine who is actually in the class and who is not. All that matters is that the question theoretically has an objective answer.

Brecher: The Second Circuit Adopts the Two-Prong Approach

Against this background, consider the Second Circuit's 2015 decision in Brecher. That appeal turned entirely on whether the class certified by the district court satisfied Rule 23's "implied requirement of ascertainability." 806 F.3d at 24. Brecher noted that the Second Circuit had never before described the ascertainability requirement, and proceeded to "define[] its content." Id.

In particular, Brecher stated that "[a] class is ascertainable when defined by objective criteria *that are administratively feasible* and when identifying its members *would not require a mini-hearing on the merits of each case*." Id. at 24–25 (emphasis added). In other words, the Brecher court adopted a version of the Third Circuit's two-part test, requiring both an objective class definition and an administratively feasible way to assess whether any given person is a member.

In case this statement was not clear enough, Brecher went on to expressly consider and reject the plaintiff's argument that an "objective" class definition is enough to satisfy the ascertainability requirement:

> *Appellee argues that a class defined by "reference to objective criteria ... is all that is required" to satisfy ascertainability. We are not persuaded.*While objective criteria may be necessary to define an ascertainable class, it cannot be the case that any objective criterion will do ....
>
> Appellee argues that the class here is comparable to those cases involving gift cards [where ascertainability has been found satisfied] .... However, gift cards are qualitatively different: For example, they exist in a physical form and possess a unique serial number. By contrast, an individual holding a beneficial interest in Argentina's bond series possesses a right to the benefit of the bond but does not hold the physical bond itself .... Further, all bonds from the same series have the same trading number identifier ..., *making it practically impossible to trace purchases and sales* of a particular beneficial interest .... [And e]ven if there were a method by which the beneficial interests could be traced, *determining class membership would require the kind of individualized mini-hearings that run contrary to the principle of ascertainability*.

In sum, Brecher could hardly have been clearer: Rule 23's ascertainability requirement requires more than a class with an "objective" definition and theoretically bright-line boundaries. It must also be possible as a "practical[]" matter for the court to "determin[e] [an individual's] class membership," and that task must be achievable without "individualized mini-hearings." It was precisely because of this lack of administrative feasibility that Brecher vacated the district court's grant of class certification.

Petrobras: Honoring Brecher in the Breach

Fast forward to a week ago, in Petrobras. There, the panel observed that, since Brecher, several other circuits had rejected the two-part ascertainability test containing an "administrative feasibility" requirement. Then, as if it were writing on a blank slate, the panel "join[ed]" that supposedly "growing consensus" by similarly "declining to adopt" an administrative feasibility requirement. It is enough to satisfy ascertainability, Petrobras explained, that a proposed class is "defined using objective criteria that establish a membership with definite boundaries." Slip op. at 39. Whether any individual's membership can feasibly be determined is beside the point: "Ascertainability does not directly concern itself with the plaintiffs' ability to offer proof of membership under a given class definition ..." Id. at 40.

One might have thought that Brecher had already decided the opposite, and that the Petrobras panel was bound by that decision. After all, Second Circuit panels "are bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of [the Second Circuit] or by the Supreme Court." United States v. Wilkerson, 361 F.3d 717, 732 (2d Cir. 2004). But one would apparently be mistaken: as the Petrobras panel saw things, Brecher's detailed discussion of administrative feasibility was "not strictly part of [its] holding" — in other words, it was just dicta. Petrobras, slip op. at 33.

Moreover, according to the Petrobras panel, those statements were "not *intended* to create an independent [administrative feasibility] element of the ascertainability test." Id. (emphasis added). According to Petrobras, Brecher's discussion of "administrative feasibility" was only intended to "convey[] the purpose underlying" the ascertainability requirement. Id. at 33–34. In other words, administrative feasibility is merely the hoped-for byproduct of the ascertainability requirement. Brecher did not actually make it part of that requirement.

With respect to the distinguished Petrobras panel, that is a strained reading of Brecher. Again, Brecher explicitly stated that "[a] class is ascertainable when defined by objective criteria *that are administratively feasible* and when identifying its members *would not require a mini-hearing*" for each putative class member. And it vacated the district court's certification grant because no feasible mechanism for identifying class members existed. Brecher clearly did not treat administrative feasibility and the absence of mini-hearings on class membership as a mere aspiration.

Leaving Leyse in the Lurch

Notably, just a few months ago, a different panel of the Second Circuit applied Brecher in a fundamentally different way from the Petrobras panel. In Leyse v. Lifetime Entertainment Services LLC, 2017 U.S. App. LEXIS 2607 (2d Cir. Feb. 15, 2017), the Second Circuit read Brecher as it was actually written, citing it for the proposition that Rule 23's ascertainability requirement requires not just an objective definition, but an "administratively feasible" way to "identify[] [the class'] members" without "a mini-hearing on the merits of each case." Id. at *3–4 (quoting Brecher, 806 F.3d at 24–25).

In Leyse, the putative class consisted of all people who received unsolicited phone calls from the defendant. That is obviously an objective class definition with precise boundaries: someone either received such a call or did not. Yet Leyse held that was insufficient: it affirmed the district court's denial of class certification on ascertainability grounds, because the plaintiff had failed to propose a method of identifying the call recipients that "was *administratively feasible*." Id. at *4 (emphasis added). As the court explained, there was "no [written] list" of the numbers that the defendant had called, and putative class members "could not realistically be expected to recall a brief phone call received six years ago." Id. Thus, even though the class was objective and had definite boundaries, it would be practically impossible to prove who belonged. Leyse gave no indication that, just months later, the Second Circuit would reverse course and declare that "[a]scertainability does not directly concern itself with the plaintiffs' ability to offer proof of membership under a given class definition ..." Petrobras, slip op. at 40 (emphasis deleted).

Of course, because Leyse was an unpublished decision, the Petrobras panel was not formally bound by its interpretation of Brecher. But it is odd that Petrobras did not even mention Leyse — let alone try to reconcile the two panels' flatly inconsistent readings of Brecher. This omission is especially strange considering that one of the judges on the Leyse panel, Reena Raggi, was herself a member of the Brecher panel — and therefore had at least as good a claim as the members of the Petrobras panel to know what Brecher actually meant.

Dicta About Dicta?

As discussed above, Petrobras was incorrect to dismiss Brecher's discussion of administrative feasibility as mere dicta. It was not dicta; it was holding. But the irony is that Petrobras' entire discussion of ascertainability — including its purported "clarification" of Brecher — was itself dicta.

After all, in Petrobras, the Second Circuit did not actually decide the defendants' appeal on ascertainability grounds. It ultimately agreed with the district court's ascertainability conclusion. It premised its judgment — vacatur of the district court's class certification grant — entirely on the district court's erroneous analysis of Rule 23(b)(3)'s predominance requirement. Thus, Petrobras' whole discussion of ascertainability was unnecessary to its judgment. That is the very definition of "dicta." See Pierre N. Leval, Judging Under the Constitution: Dicta About Dicta, 81 N.Y.U. L. Rev. 1249, 1256(2006) ("A dictum is an assertion in a court's opinion of a proposition of law which does not explain why the court's judgment goes for the winner.").

The upshot is that, in future cases within the Second Circuit, Petrobras' reinterpretation of Brecher and the ascertainability requirement should not actually be binding. Whether courts recognize this subtlety remains to be seen.

Administrative Feasibility is Dead — Long Live Administrative Feasibility

Assuming courts in the Second Circuit treat Petrobras' ascertainability discussion as binding, what will that mean in practice? Will classes now be certified even though there is no feasible way to determine who belongs to them? Not necessarily.

Despite rejecting "administrative feasibility" as an independent component of the ascertainability test, the Petrobras panel observed that the notion of administrative feasibility remains relevant. In particular, courts should consider administrative feasibility under the banner of Rule 23(b)(3)'s express requirements of predominance and superiority. Petrobras explained that "classes that require highly individualized determinations of member eligibility" may flunk the predominance requirement, because the need for such determinations may cause "questions affecting only individual [class] members" to "predominate over" classwide questions. Slip op. at 38 (emphasis deleted). Likewise, where there is no "administratively feasible mechanism for determining whether putative class members fall within the class definition," this may render a class action "unmanageable" and therefore not "superior to other available methods" of adjudication. Id. at 36–37. These questions must be answered on a case-by-case basis in light of the totality of the circumstances. Id. at 36–38.

The only general guidance that the Second Circuit provided is that "failure to certify ... on the sole ground that [a class action] would be unmanageable [and thus, not 'superior'] is disfavored and should be the exception rather than the rule." Id. at 37 (quoting In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 140 (2d Cir. 2001)). That statement is in tension with the U.S. Supreme Court's recent admonitions that class treatment itself is "the exception to the usual rule." Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013). But, even accepting that lack of administrative feasibility only rarely translates to lack of superiority, it may often — or even routinely — scuttle class certification by destroying predominance. Only time will tell.

Conclusion

In the days since Petrobras was decided, some have called it a significant setback for class action defendants in the Second Circuit. Those claims may prove overblown. As discussed above, Petrobras' reinterpretation of Brecher was technically dicta; other Second Circuit panels and district court judges may not actually be bound by it. And even if courts treat Petrobras' ascertainability discussion as binding, the net impact on class action litigation is far from clear, since it preserved a significant role for "administrative feasibility" in the class certification calculus. The practical impact of Petrobras will only

reveal itself after considerable case-by-case adjudication. That is, of course, unless the Supreme Court steps in and declares a victor in the ascertainability wars. Stay tuned.

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