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Petrobras Renounces 2nd Circ. 'Preference' For Class Cert.

By **Jonah Knobler**

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Jonah Knobler

Earlier this month, the Second Circuit decided In re Petrobras Securities,[1] and class action practitioners have been talking about it ever since — chiefly for its relevance to the red-hot "ascertainability" debate. Because Petrobras purported to reject a "heightened" ascertainability requirement, many have deemed it a setback for class action defendants. By contrast, I have written that the ultimate impact of Petrobras' comments on ascertainability remains unclear.[2]

But the hubbub over ascertainability has obscured another remarkable part of the Petrobras decision — one that constitutes a major victory for the defense side. Specifically, the Second Circuit finally rejected the decades-old canard that the grant of a class certification motion is generally preferred over the denial of such a motion. This largely overlooked aspect of Petrobras may eventually have a greater impact on class action practice in the Second Circuit than the headline discussion about ascertainability.

Lundquist: The Second Circuit Gives Plaintiffs an Unfair Advantage

Twenty-four years ago, in an obscure per curiam decision called Lundquist v. Security Pacific Automotive Financial Services Corp., the Second Circuit first stated that "we are noticeably less deferential to the district court when that court has *denied* class status than when it has *certified* a class."[3] In other words, Lundquist stated that the Second Circuit is more likely to affirm a district court's class certification decision if that decision was in the plaintiff's favor. This statement was pure dictum when it first appeared in Lundquist. But for the next two-plus decades, the Second Circuit repeated that statement in a number of class action decisions, including some where it may have been dispositive.

As I have written elsewhere, the statement is a bizarre one.[4] Standards of review are ordinarily a function of the type of decision being appealed — a ruling on a motion to dismiss is reviewed de novo; an evidentiary ruling is reviewed for abuse of discretion; etc. — and not a function of the result the district court reached. What is more, the U.S. Supreme Court made clear long before Lundquist that class certification is "[the] exception to the usual rule,"[5] and that the requirements for certification are "rigorous."[6] If anything, then, one would think that an appellate court would be more skeptical of class certification grants than denials — not the other way around.

What is more, as I have previously noted, the cases that Lundquist cited for its pro-certification bias do not support it at all.[7] Those decisions simply stated that the Second Circuit reviews district courts' class

certification decisions — whether grants or denials — less deferentially than it reviews other types of discretionary decisions, such as "the curtailment of cross-examination or the grant or denial of a continuance."[8] Those cases said nothing about preferring class certification grants over denials. The Lundquist panel just misread them. And, as later decisions uncritically quoted Lundquist, that error became self-propagating.

This unfortunate mistake did not just place a pro-plaintiff thumb on the scales at the appellate level. It almost certainly biased the district courts' initial class certification decisions as well. After all, district judges are only human; if a district judge knows that the Second Circuit will review her class certification decisions "less deferentially" if she denies class status, then consciously or not, she may feel pressured to certify.

Indeed, district courts in the Second Circuit have expressly cited the problematic Lundquist language for the proposition that, "when a court is in doubt as to whether or not to certify a class action, the court should err in favor of allowing the class to go forward." Others have cited it for the proposition that it is "beyond peradventure that the Second Circuit's general preference is for granting rather than denying class certification." Statements like these have surely led to a number of dubious class certification grants by district courts — grants that the Second Circuit, pursuant to Lundquist's slanted standard of review, would then have reviewed with undue deference, compounding the unfairness to the defendants.

Petrobras: The Second Circuit Finally Recognizes Its Mistake

There things stood when the Second Circuit decided Petrobras earlier this month. In a lengthy footnote to its recitation of the "abuse of discretion" standard of review, the Petrobras court remarked:

[A]lthough we have sometimes stated in the past that we "apply[] a 'noticeably less deferential' standard [of review] when the district court has denied class certification," this language apparently arose from a misreading of earlier Second Circuit cases. Moreover, it is out of step with recent Supreme Court authority.[9]

The court went on to trace the origins of this pro-certification language to Lundquist, and explained that the cases Lundquist cited for this standard "do not support [it]":

Thus, neither [of the cases cited by Lundquist] applied a different standard to denials versus grants of class certification. Rather, both cases stated that this Court is more likely to find abuse of discretion in appeals involving the issue of class certification — whether certification was granted or denied — when compared with other types of legal issues. It appears that Lundquist misinterpreted that comparison.[10]

The Petrobras panel then observed that this bias toward certification runs counter to recent Supreme Court decisions, such as Wal-Mart Stores Inc. v. Dukes[11] and Comcast Corp. v. Behrend,[12] which emphasize the "rigorous" test that a plaintiff must meet to obtain class status.[13] (That is certainly true — but, as noted above, the Supreme Court has been clear about the "rigorous" nature of Rule 23's requirements for decades.)

In the end, Petrobras did not formally overrule Lundquist. It would take an en banc decision or the assent of the full Second Circuit to do that. But it left Lundquist's pro-certification bias a dead man walking, explaining that it "need not and ought not" continue to exist. "Should the resolution of this issue prove determinative of the outcome in a future matter," Petrobras stated, "the question can likely

be resolved by this Court's protocol for the circulation of opinions [to the full court] at that time."

Conclusion: A Newly Level Playing Field for Class Action Defendants

Even though Lundquist's slanted standard technically remains on the books — at least for now — the Petrobras court's evisceration of that standard may have a resounding impact on class actions in the Second Circuit. Once again, district courts have decided class certification motions for decades under the impression that the Second Circuit has a "preference ... for granting ... class certification." That supposed preference has always rested on a foundation of sand — and now, the Second Circuit has thoroughly demolished it. District judges throughout the Second Circuit should no longer feel pressured to grant class certification in cases where the question is close, let alone in cases where their own preference would be to deny it.

To the contrary, Petrobras makes clear, district courts should apply Rule 23's requirements "rigorously" and certify classes only if each of those requirements are clearly met by a preponderance of the evidence. This long-overdue recognition — rather than the much-heralded discussion of ascertainability — may well prove to be Petrobras' most significant legacy.

Jonah M. Knobler is a partner in the litigation department at Patterson Belknap Webb & Tyler LLP. He focuses his practice on consumer class actions, false advertising, food and drug law, and intellectual property.

[1] No. 16-1914-cv (2d Cir. July 7, 2017).

[2] Jonah Knobler, Petrobras Does Little To Clarify Class Ascertainability, Law360 (July 14, 2017).

[3] Lundquist v. Sec. Pac. Auto. Fin. Servs. Corp., 993 F.2d 11 (1993) (emphasis added)

[4] Jonah Knobler, Class Actions in the Second Circuit: Do Plaintiffs Have Unfair Advantage? N.Y. Law Journal, Vol. 253 No. 46 (Mar. 11, 2015).

[5] Califano v. Yamasaki, 442 U.S. 682 (1979).

[6] Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147 (1982).

[7] Knobler, supra note 4.

[8] Abrams v. Interco, 719 F.2d 23 (2d Cir. 1983).

[9] Petrobras, slip op. at 18 n.11.

[10] Id. at 19 n.11.

[11] 564 U.S. 338 (2011).

[12] 133 S. Ct. 1426 (2013).

[13] Petrobras, slip op. at 19 n.11.
