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City Select v. BMW: Ascertainability Is Alive And Well In The Third Circuit

The Third Circuit's August ruling in *City Select Auto Sales v. BMW Bank of North America* is not a retreat from the court's ''heightened'' ascertainability test, attorneys Jonah Knobler and J. Taylor Kirklin say. The ruling is a faithful application of that test to the unusual situation where an objective (albeit potentially overinclusive) list of all class members is available, the authors say.

By Jonah M. Knobler and J. Taylor Kirklin

In the world of class actions, few issues are hotter right now than the debate over ''ascertainability''—that is, when courts may certify classes whose membership is unclear or difficult to verify. The archetypal case where the ascertainability requirement comes into play is the small-dollar consumer-protection claim involving (say) a grocery store item, where there is no ''master list'' of purchasers or other documentary evidence of class membership, and where memories of the crucial events are likely to be hazy at best.

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The Third Circuit is famous for minting a demanding or ''heightened'' ascertainability test that makes class certification difficult in cases like these. *See Carrera v. Bayer*, 727 F.3d 300 (3d Cir. 2013). Even as other circuits began to criticize that test, and a vocal minority of the Third Circuit urged its abandonment, that court stuck to its guns. So the class-action world raised an eyebrow when the Third Circuit issued its recent decision in *City Select Auto Sales Inc. v. BMW Bank of North America Inc.*, No. 15-3931, 2017 BL 286478 (3d Cir. Aug. 16, 2017), vacating a trial court ruling that had denied class certification on ascertainability grounds.

Some have spun *City Select* as a retreat from the strict ascertainability test that the Third Circuit pioneered in *Carrera*. But that isn't the case: the ''heightened'' ascertainability test is alive and well in the Third Circuit.

The Ascertainability Wars All circuits agree that an implied ascertainability requirement exists under Federal Rule of Civil Procedure 23, and that a plaintiff must satisfy it before a class may be certified. But there is deep disagreement as to what this requirement entails.

The Third Circuit was the first to give the ascertainability requirement serious attention. As it held in its pathbreaking *Carrera* decision, would-be class representatives must make a two-part showing: (1) that the class is defined using ''objective criteria''; and (2) that there is a ''reliable'' and ''administratively feasible'' method of determining whether a given person is a class member without ''extensive and individualized

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fact-finding.'' The first prong rules out classes defined in purely subjective terms (*e.g.*, ''consumers who *were unsatisfied* with Product X''). The second prong rules out classes where, despite an objective definition, there is no reliable and efficient way to determine who satisfies that definition. Importantly, *Carrera* explained that ''a method . . . amount[ing] to no more than ascertaining by potential class members' say so'' cannot satisfy this latter prong, because the risk of error is too high.

At first, other circuits embraced the Third Circuit's two-part test. *See, e.g.*, *Karhu v. Vital Pharms., Inc.*, 621 F. App'x 945 (11th Cir. 2015); *Brecher v. Repub. of Argentina*, 806 F.3d 22 (2d Cir. 2015). But then, the Seventh Circuit sparked a backlash by rejecting the ''administratively feasible'' prong of the Third Circuit's test and holding that an ''objective'' class definition is all that is required. *Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015). The Sixth and Ninth Circuits then fell in line with the Seventh. *See Rikos v. Procter & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015); *Briseño v. Conagra*, 844 F.3d 1121 (9th Cir. 2017). The Second Circuit, sensing a trend, then switched sides and disavowed the two-part ''heightened'' test. *In re Petrobras Sec. Litig.*, 862 F.3d 250 (2d Cir. 2017). But just days later, the Sixth Circuit moved in the opposite direction, holding that ''individual affidavits'' from putative class members were not a feasible or reliable method of ascertaining class membership. *Sandusky Wellness Ctr., Ltd. Liab. Co. v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460 (6th Cir. 2017).

This confusion cries out for Supreme Court review. And, indeed, the high court is currently weighing whether to grant certiorari in *Briseño*—the Ninth Circuit's recent ascertainability case—and settle the debate once and for all. *See* Petition for Writ of Certiorari, *Conagra Brands, Inc. v. Briseño*, No. 16-1221 (Apr. 10, 2017). Class-action mavens are waiting with bated breath to see what the Supreme Court does. In the meantime, they are closely scrutinizing every lower court ascertainability decision to see which side has the momentum going into the Court's first conference of the Term on September 25.

In a recent supplemental brief to the Supreme Court, the *Briseño* plaintiffs called the Third Circuit's *City Select* decision ''a clear and significant repudiation'' of that court's own ''heightened'' ascertainability test. It would indeed be a major development if the Third Circuit—the progenitor and chief advocate of the ''heightened'' test—confessed error and switched sides. But that is decidedly not what happened in *City Select*.

***City Select* – Nothing But The Fax** *City Select* was a suit involving unsolicited junk faxes that BMW allegedly sent to car dealerships. The named plaintiff, a New Jersey dealership, alleged that it had received one of those faxes. As any reasonable recipient of a junk fax would do, the dealership brought a putative class action against BMW, alleging violations of the Telephone Consumer Protection Act (''TCPA'') and common-law conversion.

In its motion for class certification, the plaintiff explained that the recipient list for BMW's junk faxes had been compiled from a database of auto dealership contact information maintained by a third party called Creditsmarts. In other words, the identities of every putative class member were contained somewhere within the Creditsmarts database. The problem was that, apparently, only a subset of the dealerships in the database had actually received one of BMW's faxes. Thus, while the database could be used to place an outer bound on the ''universe'' of ''potential'' fax recipients, it could not get the plaintiff all the way home.

The district court denied class certification on the sole basis of lack of ascertainability. Although the class was defined using objective criteria—namely, all dealerships that had received one of BMW's faxes—the court found that there was no ''administratively feasible'' way to determine who belonged to that class. The Creditsmarts database did not suffice, since it was overinclusive. The plaintiff proposed that affidavits from fax recipients could be used to determine which of the dealerships in the database were actually class members. The district court dismissed this proposal out of hand, believing that *Carrera* had categorically barred the use of affidavits in the ascertainment process.

The Third Circuit's Ruling In a decision by Judge Scirica, the author of the famed *Carrera* decision, the Third Circuit concluded that the district court had erred in its ascertainability analysis. Consequently, it vacated the district court's decision and remanded for further proceedings.

The Third Circuit began by reiterating *Carrera*'s two-part test: the plaintiff must offer both an objective class definition and a ''reliable and administratively feasible mechanism for determining whether putative class members fall within [that] definition.'' The court then reaffirmed *Carrera*'s observation that ''[a]ffidavits from potential class members, standing alone,'' do not constitute such a ''reliable and administratively feasible mechanism.''

But ''standing alone'' is the key phrase. *Carrera* and its progeny, the Third Circuit explained, did not ''categorically preclude [the use] affidavits from potential class members.'' In some cases, the court observed, affidavits ''in combination with'' other, objective records—such as the Creditsmarts database—might ''meet the ascertainability standard.'' That question must be answered based on ''the facts of [each] particular case,'' and not categorically, as the district court had done.

In the Third Circuit's view, it all came down to the specifics of the Creditsmarts database. ''The amount of over-inclusiveness'' in that database was ''critical'': while ''a high degree of over-inclusiveness could prevent certification,'' a *de minimis* degree would not. That seems logical enough: if the database contained only a handful of extra names, the threat of fraudulent or mistaken claims would be quite small, since any claimant not found in the database would be immediately re-

jected. Under those circumstances, using affidavits to close the narrow gap between the list of names in the database and the set of dealerships who actually received BMW's faxes might not pose a serious threat to BMW's due process rights. On the other hand, if the Creditsmarts database was vastly overinclusive, then relying on potential class members' say-so to ascertain class membership would be far more prejudicial to BMW.

Unfortunately, the Creditsmarts database had never been produced in discovery, so no one knew exactly how overinclusive it was (or if it was actually overinclusive at all). And so the Third Circuit remanded the case ''so that the Creditsmarts database [could] be produced'' for the district court to consider. Importantly, the Third Circuit ''t[ook] no position'' on whether the ascertainability requirement could eventually be met.

What *City Select* Really Means As noted above, some commentators have characterized *City Select* as a ''softening'' of the Third Circuit's ''hard stance on ascertainability.'' The plaintiffs in *Briseño* went further, telling the Supreme Court that *City Select* is a ''clear . . . repudiation'' by the Third Circuit of its own ascertainability precedents. But that claim is inaccurate.

First, *Carrera* held that ''say-so'' affidavits from potential class members *standing alone* will not suffice. And in *Carrera* itself, ''say-so'' affidavits were all that the plaintiffs could offer. There was no ''master list'' of actual—or even potential—class members, as there was *City Select*. Second, the evidentiary record in *Carrera* demonstrated that consumer affidavits would be unreliable in the specific circumstances of that case: at his deposition, the named plaintiff could not even identify the product he purchased, let alone remember when he purchased it. By contrast, in *City Select*, the named plaintiff never had the chance to test how reliable affidavits might be when used in conjunction with the Creditsmarts database, since the database was never produced. And third, to reiterate, the *City Select* court did not hold that affidavits *would in fact* render the putative class ascertainable. It expressly left open the possibility that, even in combination with the database, affidavits might still flunk the test.

Thus, in reality, *City Select* is not a retreat from the Third Circuit's ''heightened'' test at all. It is a faithful application of that test to the unusual situation where an objective (albeit potentially overinclusive) list of all class members is available. That will not be true in most consumer class actions—especially in cases like *Carrera* involving grocery store items or other goods purchased at retail. Moreover, *City Select* expressly reiterates the Third Circuit's belief that a strict ascertainability showing—including a ''reliable and administratively feasible'' verification method—is needed to ''ensure[] that [the] defendant's rights are protected'' and to guarantee that class actions are certified only when they will actually bring about the ''efficiencies'' that they are supposed to provide. That is a marked contrast with the views of certain other circuits that seem to believe that a class action is the answer to every alleged corporate misdeed.

We will find out soon enough if the Supreme Court will hear *Briseño* and declare a victor in the ascertainability wars. But in the meantime (with apologies to Mark Twain), the rumors of the ''heightened'' ascertainability test's demise have been greatly exaggerated.