

Alert | Class Action Litigation



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California Supreme Court Weakens Ascertainability Requirement for Class Certification

Rejecting multiple Court of Appeal decisions requiring that plaintiffs provide an administratively feasible method to identify putative class members, the California Supreme Court has held that a proposed class is “ascertainable” when it is defined “in terms of objective characteristics and common transactional facts” that make “the ultimate identification of class members possible when that identification becomes necessary.” *Noel v. Thrifty Payless, Inc.*, (Cal. 2019) (No. S246490). The Court emphasized that a plaintiff does *not* need to present evidence showing that class members can “be readily identified without unreasonable expense or time by reference to official records” and that decisions imposing this requirement were no longer good law. The *Noel* decision substantially weakens the ascertainability requirement in California and may lead to more decisions granting certification.

Summary of the Case

The plaintiff in *Noel* filed a putative class action alleging that defendants falsely advertised the size of an inflatable outdoor pool by using a photograph on the packaging depicting multiple adults in the pool when the pool could only hold a few small children. Noel moved to certify a class of “[a]ll persons who purchased the Ready Set Pool at a [drug]store located in California within the four years preceding the date of the filing of this action.” In his briefing, Noel described various ways in which notice might be distributed to absent class members when the time came to do so, but pointed to no evidence showing

how individual class members could be identified and notified. The trial court denied the motion for class certification because plaintiff did not provide evidence showing how class members might be individually identified, and the Court of Appeal affirmed.

The California Supreme Court reversed, concluding that the trial court applied the wrong ascertainability standard. The Court held that a class is ascertainable when it is defined “in terms of objective characteristics and common transactional facts” that make “the ultimate identification of class members possible when that identification becomes necessary.” In the Court’s view, that standard was satisfied because the class definition provided a basis for class members to self-identify: “[a] member of the class could appreciate from this definition whether he or she is included within it, and thus be in a position to take appropriate steps to protect his or her interests.”

Disapproving multiple Court of Appeal decisions, the California Supreme Court concluded that the lower courts erred by requiring an additional evidentiary showing on ascertainability. It held that “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.” Emphasizing that this “bright-line rule” would allow courts to consider all the relevant factors for crafting and sending notice, the Court concluded that concerns about providing personal notice were not a basis for finding that the class was unascertainable.

The California Supreme Court was careful to note arguments and evidence relating to class notice conceivably could counsel against class certification if another requirement was not met – for example, that a class action is unmanageable, or that a class proceeding is not superior. The Court also noted that its ascertainability standard still addressed “fairness concerns that may be associated with other problematic class definitions, such as a class defined by its putative members’ subjective states of mind, as opposed to objective facts.”

Impact on Class Actions

By weakening the ascertainability requirement, the *Noel* decision will make it easier for California plaintiffs to prevail on motions for class certification. Plaintiffs will no longer have to show an administratively feasible method for identifying putative class members, which should lead to more decisions granting certification, particularly in cases involving retail purchasers, where identifying class members can be more challenging. The decision also aligns with the general trend on ascertainability in federal court, thus eliminating one reason a defendant might have preferred to remain in state court. That said, the decision also underscores that the ascertainability requirement, although weakened, retains meaning, particularly where plaintiffs try to define classes based on subjective elements. To be ascertainable, a class must be defined based on objective facts and common transactional requirements, thus providing defendants with a basis to continue challenging vague or circular class definitions.

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