

Ascertainability Requirement for Class Certification Is Alive and Well in Third Circuit



While some commentators have suggested the recent Third Circuit decision in 'Hargrove v. Sleepy's' has walked back the standard, 'Hargrove' and recent District of New Jersey decisions are a reminder that the ascertainability requirement is alive and well.

By David Sellinger and Samantha Varsalona | December 11, 2020 | New Jersey Law Journal

Ascertainability has been, and will likely continue to be, an important requirement for class certification in the Third Circuit. Over the past decade, almost every circuit has, in one way or another, weighed in on the ascertainability debate. The Third Circuit led the way in defining a “heightened” ascertainability standard in the trilogy of decisions: *Marcus v. BMW of North America*, 687 F.3d 583 (3d Cir. 2012); *Hayes v. Wal-Mart Stores*, 725 F.3d 349 (3d Cir. 2013); and *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013).

In order for a class to be ascertainable under this standard, the class definition must be “currently and readily ascertainable based on objective criteria,” and there must be “a reliable and administratively feasible method” of determining class membership. Further, that method must “permit[] a defendant to challenge the evidence used to prove class membership.” In other words, the Third Circuit, unlike a number of other circuits, requires that both the “objective criteria” and “administratively feasible method” elements are satisfied when considering whether a proposed class is “ascertainable” for class certification purposes.

In the years following the trilogy cases, the District of New Jersey as well as the Third Circuit have continued to wrestle with and expound upon the ascertainability standard, and more specifically, what exactly is an “administratively feasible” method. There have been numerous class certification decisions in the District of New Jersey which, predictably, have been fact-specific in their outcomes as to whether there was a reliable, administratively feasible mechanism available for determining who is in the class. While some commentators have suggested the recent decision in *Hargrove v. Sleepy's*, 974 F.3d 467 (3d Cir. 2020), has walked back the standard, *Hargrove* and recent District of New Jersey decisions are a reminder that the ascertainability requirement is alive and well.

In *Hargrove*, an employment case, the Third Circuit reversed the district court’s denial of class certification, holding that at the class certification stage, the court does not need to be able to currently identify all class

members—it must only be able to show that class members can be identified in a reliable and administratively feasible way. There, a putative class of delivery drivers for the defendant, Sleepy’s, alleged that Sleepy’s misclassified them as independent contractors rather than employees, thus denying them benefits under New Jersey and federal employment laws. The district court determined that the class was unascertainable based on Sleepy’s inadequate personnel records.

Reversing, the Third Circuit reaffirmed that class members must be able to be identified in a reliable and administratively feasible way but held that the district court had been “too exacting and essentially, demanded that the class members be identified at the certification stage.” This part of the decision is unremarkable, as it has been well-established since the court’s decisions in *Carrera* and *Byrd v. Aaron’s*, 784 F.3d 154, 163 (3d Cir. 2015), that ascertainability does not require that the court identify all class members at the class certification stage. The court explained that, although the driver records kept by Sleepy’s were incomplete, the information that Sleepy’s did produce—which consisted of thousands of pages of contracts, driver rosters, gate logs, and pay statements—when considered as a whole and in conjunction with affidavits, provided a reliable and feasible mechanism to ascertain class members. The decision, citing *City Select Auto Sales v. BMW of N. Am.*, 867 F.3d 434 (3d Cir. 2017), noted that Third Circuit law already established that affidavits can be used with records or other reliable, administratively feasible means to meet the ascertainability requirement.

Further, with respect to certain gaps in the records which the district court found doomed the drivers’ administrative feasibility argument, the Third Circuit, observing those were the result of Sleepy’s own faulty record-keeping, concluded that “where an employer has failed to keep records it was required to keep by law, employees can prove ascertainability by producing ‘sufficient evidence’ to define their proposed class as ‘a matter of just and reasonable inference.’” That part of the decision simply followed the Supreme Court decision in *Tyson Foods v. Bouaphakeo*, 136 S. Ct. 1036, 1040 (2016), which related specifically to the employment context.

A survey of recent District of New Jersey decisions shows that *Hargrove* is, by and large, consistent with how the District of New Jersey has been applying and interpreting the administrative feasibility requirement. While the ascertainability analysis is fact-specific, consistent throughout these decisions is the recognition that a putative class representative must present an administratively feasible mechanism to identify class members, which typically can be proven by datasets, such as company databases, employment records, or even third-party records. Further, where Third Circuit law has permitted gap-filling with affidavits, the affidavits accepted in those cases augmented objective records or other reliable, administratively feasible methods, enabling the defendant to kick the tires and challenge the evidence used to prove class membership.

After the Third Circuit’s decision in *Hargrove*, the district court in *Espinal v. Bob’s Discount Furniture*, 2020 U.S. Dist. LEXIS 190135, at *2 (D.N.J. Oct. 14, 2020), was the first to analyze and apply *Hargrove*. The putative class members there were delivery drivers and helpers who brought employment claims against a furniture company and a freight forwarder. The freight forwarder used independent motor carriers to deliver the furniture to customers. While concluding that the plaintiffs had not yet satisfied the ascertainability requirement, the court found that the plaintiffs did in fact identify methods through which administrative feasibility could be satisfied—specifically, by using driver manifests, which contained the name of the assigned driver and helper, or customer service metrics utilized to evaluate drivers and helpers. But that data was not in the record. Denying class certification without prejudice, the court, citing *Hargrove*, held that since there was a statutory duty to maintain the missing records, plaintiffs could attempt to subpoena the carriers for relevant records; alternatively, the court held, if neither the defendants nor the carriers had such records, plaintiffs could meet their ascertainability burden by producing

“sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.” In other words, *Espinal* was a case in the employment context that followed, and was controlled by, the decision in *Hargrove*.

In *Afzal v. BMW of North America*, 2020 U.S. Dist. LEXIS 93849 (D.N.J. May 29, 2020), a consumer class action, the plaintiffs alleged a product defect in BMW engines and sought certification of two classes: a warranty class and a dealership class. The court determined that the dealership class failed on ascertainability grounds because, among other things, the plaintiffs had not proposed any method of ascertaining whether a putative class member incurred out-of-pocket costs in repairing the allegedly faulty part. Although current owners may have service records to substantiate their claim, the court observed, the plaintiffs offered no evidence of how former owners—who were included in the class definition—could substantiate a claim, especially considering it was unlikely that former owners retain service records for vehicles they no longer own. In contrast, the court held that the warranty class was administratively feasible because the class members would be able to use affidavits or government records as well as the vehicle’s on-board computer data or service records to determine the identity of class members. Specifically, Department of Motor Vehicles records or class member affidavits could be used to establish class members’ residency, and service records or the vehicle’s on-board computer could demonstrate mileage on a given date in a contested case.

In *Johnson v. Comodo Group*, 2020 U.S. Dist. LEXIS 18033 (D.N.J. Jan 31, 2020), the plaintiff sought certification of a proposed class of individuals who alleged that the defendant used an automatic telephone dialing system to make unlawful telemarketing calls. The plaintiff submitted expert testimony that the expert could utilize telephone numbers in the defendant’s call logs, enter them into a database, and then produce a report identifying the names of the persons with those numbers. Defendant disputed the reliability of the methodology, noting the possibility that the numbers may have been reassigned to others. Even so, the court held that since the defendant specifically targeted the plaintiffs by name and because any confusion as to reassigned telephone numbers could be confirmed by affidavit, plaintiffs established the administrative feasibility of ascertaining the members of the putative class.

In *In re: Tropicana Orange Juice Mktg. & Sales Practices Litig.*, 2018 U.S. Dist. LEXIS 9797 (D.N.J. Jan. 22, 2018), a consumer class action brought against a juice manufacturer, the district court denied class certification because, among other things, there was no reliable and administratively feasible way of identifying certain of the class members. Plaintiffs contended that their expert could create a computer program that would reliably identify all class members. The expert’s proposed methodology would require a putative class member to submit an electronic claim form containing personal identifying information. The expert proposed that he would then collect various retailers’ data regarding customer purchases, standardize it and create a program that would match and cross-check the individuals’ available personal information against the corresponding fields in the retailers’ customer records. Rejecting that assertion, the court noted that the proposed methodology assumed that the retailer data existed and contained the necessary information required to properly “cross-check” against the claim forms. Ultimately, because the retailer data was the critical objective dataset to determine class membership—and that data was not of record—the plaintiffs failed to show there was an administratively reliable method to ascertain class membership.

These recent decisions and numerous other cases demonstrate that ascertainability remains an important aspect of the class certification standard applied by the courts in the District of New Jersey. With respect to ascertainability, a constant throughout the opinions is that the plaintiff must satisfy the reliable and administratively feasible method requirement, typically based on some type of objective dataset.

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