Legal Sidebar

How Hard Should It Be To Bring a Class Action?

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As Judge Richard Posner observed in a 2014 opinion, "the class action is an ingenious procedural innovation that enables persons who have suffered a wrongful injury . . . to obtain relief as a group." In that same opinion, however, Judge Posner also noted that class actions are potentially susceptible to abuse by plaintiffs and their attorneys, who may act to the detriment not only of the defendants, but also of the class members whose interests the plaintiffs purport to represent.

To curb such abuses, many courts have prohibited plaintiffs from pursuing a class action unless the plaintiff first proves that the proposed class is "ascertainable"—that is, that "the members of [the] proposed class" are "readily identifiable." Courts disagree, however, over what "ascertainability" means. In particular, the U.S. Courts of Appeals have divided regarding whether a plaintiff must satisfy a separate "administrative feasibility" requirement in order to prove that a proposed class is ascertainable. Because defendants have successfully invoked this "administrative feasibility" requirement "with increasing frequency" in order to defeat class actions, some commentators have dubbed administrative feasibility "one of the most contentious issues in class action litigation these days." The debate over ascertainability takes place against a broader debate over class actions generally, with companies increasingly reporting that they "are facing bet-the-company class actions in which the exposure is deemed potentially devastating to the company," while proponents of class actions have voiced increasing concerns about legislative and judicial efforts to limit the procedural device. This Sidebar explores the burgeoning administrative feasibility requirement and its broader significance to class action litigation and consumer rights.

Background on Class Actions

A class action allows a group (i.e., a "class") of persons affected by a defendant's allegedly unlawful action to challenge that action in a single lawsuit, rather than through numerous, separate suits prosecuted by each individual plaintiff. In a class action, the plaintiff (known as the "class representative" or the "named plaintiff") sues the defendant not only on his own behalf, but also on behalf of other similarly situated persons (the "class members"). The class members are usually not formal parties to the lawsuit and typically do not actively participate in the case—in this way, they are effectively "absent" from the litigation. Class action litigation is therefore "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only."

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The "Ascertainability" Requirement

In order to protect the interests of the absent class members, a federal court may not "certify" a class action—that is, allow a case to proceed as an action on behalf of the entire class, rather than as an individual lawsuit on behalf of the named plaintiff alone—unless the proposed class satisfies certain prerequisites. Most federal courts have concluded that those prerequisites include a requirement that the proposed class be "ascertainable"—i.e., that "the members of [the] proposed class" be "readily identifiable." "The purpose of the ascertainability requirement is to avoid 'satellite litigation' over who is a member of the class and to 'properly enforce the preclusive effect of'" a final judgment in a class action case "by clarifying 'who gets the benefit of any relief and who gets the burden of any loss.'"

Courts largely agree that a proposed class cannot satisfy the ascertainability requirement unless membership in the class is "defined by objective criteria rather than by, for example, a class member's state of mind." So, for instance, as one court ruled, a proposed class of people who merely "felt discouraged" as a result of a defendant's actions is insufficiently ascertainable, as the feeling of "discouragement" is entirely subjective.

Administrative Feasibility

Some courts, however, require a would-be class representative to do more than merely define the proposed class "with reference to objective criteria." The U.S. Courts of Appeals for the Third and Eleventh Circuits have held that, in order to satisfy the ascertainability requirement, the plaintiff must also propose a "reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." Courts in these circuits will not certify a proposed class "if individualized fact-finding or mini-trials will be required to" determine whether or not any given person is a member of the proposed class. Supporters maintain that this "administrative feasibility" requirement serves several important purposes, including:

- Promoting administrative convenience "by insisting on the easy identification of class members";
- Protecting class members by increasing the likelihood that absent class members will receive notice of the class action;
- Decreasing the likelihood that persons who are not actually members of the class will submit "fraudulent or inaccurate claims"; and
- Protecting defendants by safeguarding their "due process right . . . to 'challenge the proof used to demonstrate class membership.'"

Two recent Third Circuit cases illustrate how this administrative feasibility requirement works in practice, as well as how it prevents certain cases from proceeding as class actions. In *Carrera v. Bayer Corp.*, for instance, a class of consumers claimed that the defendant "falsely and deceptively advertised" a dietary supplement. The proposed class representative accordingly sought to certify a class action against the defendant. However, because the class representative failed to establish a reliable method for determining "whether each class member purchased" the dietary supplement, the Third Circuit ruled that the proposed class action failed to satisfy the administrative feasibility requirement. Because the defendant "did not sell [the dietary supplement] directly to consumers," there was no readily available "list of purchasers" from which anyone could reliably and easily determine who purchased the supplement and who didn't. The Third Circuit therefore concluded that the proposed class representative had failed to produce any "evidence that a single purchaser of [the supplement] could be identified" and was therefore unable to satisfy the administrative feasibility requirement.

In *Byrd v. Aaron's Inc.*, by contrast, the Third Circuit ruled that the plaintiffs *had* satisfied the administrative feasibility requirement. The class representatives in *Byrd* alleged that the defendant had unlawfully installed spyware on their computers, as well as those of numerous absent class members.

Unlike in *Carrera*, however, the defendant's "own records reveal[ed] the computers upon which [the spyware] was activated, as well as the full identity of the customer who leased or purchased each of those computers." The Third Circuit accordingly concluded that there was an administratively feasible mechanism to identify who was and was not a member of the proposed class.

Criticisms of the "Administrative Feasibility" Requirement

The administrative feasibility requirement can therefore defeat class certification where putative class members lack evidence—"other than the uncorroborated testimony of the buyers themselves"—that they do in fact belong to the class, as was the case in *Carrera*. Class members may be especially unable to verify their membership in a class in "consumer class actions involving low-priced items." Because customers "usually throw away their receipts, retail stores rarely keep records of purchasers, and manufacturers have no way to know who bought an item downstream," members of proposed consumer class actions may lack hard evidence that they actually purchased the product in question. Moreover, even if class members could aver by affidavit that they bought the product at issue, that may not satisfy the administrative feasibility requirement; the Third and Eleventh Circuits have held that "affidavits from potential class members, standing alone, without 'records to identify class members or a method to weed out unreliable affidavits,' will not constitute a reliable and administratively feasible means of determining class membership."

Critics therefore argue that the administrative feasibility requirement "effectively bars low-value consumer class actions, at least where plaintiffs do not have documentary proof of purchases, and sometimes even when they do." In the words of one federal judge, "if class actions could be defeated because membership was difficult to ascertain at the class certification stage, 'there would be no such thing as a consumer class action.'" As a result, the Second, Sixth, Seventh, and Ninth Circuits have split from the Third and Eleventh Circuits by declining to impose a "separate administrative feasibility prerequisite to class certification" and by allowing would-be class members to "self-identif[y] by affidavit."

To date, the Supreme Court has declined to resolve the circuit split over administrative feasibility on no fewer than three different occasions. Thus, in the absence of a decisive pronouncement from the Supreme Court regarding the viability of the administrative feasibility requirement, a plaintiff's ability to pursue a class action currently depends (at least in part) upon the geographic location where the plaintiff chooses to file a case.

Options for Congress

If Congress seeks to resolve this circuit split, it has several options. To make it more difficult to pursue a class action, Congress could enact legislation codifying the administrative feasibility requirement adopted by the Third and Eleventh Circuits. Alternatively, to make it easier to pursue a class action, Congress could enact legislation specifying that a plaintiff need not satisfy a freestanding administrative feasibility requirement as a prerequisite for class certification.

Some Members of the 115th Congress have introduced legislation that would implement some of these proposals. For instance, if enacted, the Fairness in Class Action Litigation & Furthering Asbestos Claim Transparency Act of 2017 (the Act) would prohibit certification of a class action unless the plaintiff "affirmatively demonstrates that there is a reliable and administratively feasible mechanism . . . for the court to determine whether putative class members fall within the class definition." The Act would thereby codify the administrative feasibility requirement adopted by the Third and Eleventh Circuits and abrogate the holdings of circuits that have not imposed that requirement. As of the time of this writing, the Act has passed the House and is pending before the Senate.

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