

# Class Actions Alert

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## California Supreme Court Revises Ascertainability Prerequisite to Class Certification

August 2, 2019

### Key Points

- In *Noel v. Thrifty Payless, Inc.*, the California Supreme Court clarified the scope of the ascertainability prerequisite to class certification. The Court held that proposed classes are ascertainable if defined by objective characteristics and common transactional facts.
- The Court also rejected subjective and “fail-safe” class definitions as failing to meet the ascertainability prerequisite.
- Defendants remain free to oppose class certification on grounds that class membership requires an individualized determination, that the class cannot be adequately notified, and that the proposed class is unmanageable and presents an inferior means of resolution.

In a significant ruling this week, the California Supreme Court addressed the extent to which a proposed class must be ascertainable to be certified for class treatment under section 382 of the California Code of Civil Procedure. Addressing an issue that has split the federal circuits, the Court in *Noel v. Thrifty Payless, Inc.* held that a proposed class must be defined by objective criteria, and rejected class definitions tied to the subjective views of proposed class members and “fail-safe” classes, defined by the elements of the underlying claim.

However, similar to the 9th Circuit in *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017), the Court held that the proponent of certification is not required to show that members of the proposed class can be readily identified. Plaintiff’s inability to present a class list or other means for determining who is in the class does not sound the death knell for certification, although it does remain a factor in determining whether the class is manageable and otherwise suited for certification.

### Background

California courts have long required that the party seeking class certification show that the proposed class is ascertainable. In 1948, the California Supreme Court rejected a proposed class of persons who had waited in line for tickets to the prior year’s Rose Bowl only to be wrongfully refused admission, because members of the class could

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not be ascertained. In the intervening 70 years, intermediate California appellate courts promulgated a variety of tests for determining whether a proposed class was ascertainable. Some courts had required that the class proponent show a realistic means for identifying most class members, while others had focused on whether the proposed class was defined by objective criteria.

These two standards had their counterparts in the federal courts. Some circuits require that to obtain certification, plaintiff must show a feasible means of identifying members of the class—typically through a “class list” or database with class contact information—and denied certification where class membership would require an individualized determination. Others, including the 7th Circuit in *Mullins v. Direct Digital, LLC*, 795 F.3d 654 (2015), held that the ability to readily identify class members was only one of several factors to consider in determining whether the class should be certified.

### **The Noel Decision**

In *Noel*, the trial court had denied class certification on a proposed class of California purchasers of a \$59.99 inflatable outdoor pool on the grounds that plaintiff had not shown any means of identifying class members. The intermediate appellate court affirmed, finding no abuse of discretion, particularly given the risk of jeopardizing the due process rights of absent class members through inadequate class notice.

The California Supreme Court reversed, in an extended opinion that surveyed the split in California and federal decisional law before aligning with the federal view represented by *Mullins*. Citing *Mullins*, the Court confirmed that as a matter of law, the class must be defined by objective criteria, rather than class members’ subjective state of mind or in terms of success on the merits.

Even so, plaintiffs are not required to show a feasible means of identifying class members as a prerequisite to certification. Instead, trial courts can consider any concerns as to class notice in their overall assessment of whether to grant class certification, including whether the case, if certified, would be manageable and superior to other means of resolving the dispute. Since the trial court denied certification on the ground that the class was not ascertainable, and the scope of its additional grounds for denying certification were uncertain, the Supreme Court reversed its decision and remanded for further proceedings.

### **Takeaways**

The Court’s opinion addresses only incidentally the defendant’s interest in an ascertainable class, and in particular, the defendant’s due process right to present defenses to the claims asserted against it—including that a particular individual does not meet the objective criteria of the class definition. Whether the allegation is that the claimant was a would-be ticket holder to the Rose Bowl or purchased an inflatable pool, the defendant has the right to challenge that core allegation. In an individual lawsuit, that challenge often requires an individualized resolution; this same right to an individual resolution must be preserved in the class context, particularly where there is no contemporaneous evidence that readily permits identification of class members.

To be sure, the *Noel* decision reserves a defendant’s right to raise these issues in opposing class certification—for example, by arguing that individualized issues predominate, or that the class is not manageable and not a superior means of

adjudicating the dispute. Indeed, by confirming that trial courts should consider the feasibility of class notice at the time of the certification decision, the decision points the way to greater judicial scrutiny of classes where questionable or no administratively feasible means of identifying class members, exist. Also helpful is the Supreme Court's recognition that fail-safe classes are per se improper; this ruling should assist in challenging, at the pleadings, putative classes defined by reference to the statutory elements of the underlying claim.

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