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PERSPECTIVE

Class ascertainability decision leaves open questions

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In a recent ruling, the California Supreme Court considered the extent to which a proposed class must be ascertainable in order to be certified for class treatment. In a narrow ruling, the court in *Noel v. Thrifty Payless, Inc.*, 2019 DJDAR 7074 (July 29, 2019), held that a proposed class must be defined by objective criteria. Similar to the 9th U.S. Circuit Court of Appeals' ruling in *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017), the court declined to require that the proponent of certification show that class members can be readily identified as a prerequisite to certification. However, the court otherwise rejected class definitions tied to the subjective views of class members, and "fail-safe" class definitions tied to the elements of the underlying claim.

By its terms, the *Noel* opinion addresses only one of several requirements for class certification. As the Supreme Court recognized, trial courts may consider the difficulty of identifying class members in evaluating the remaining requirements for certification, including whether the proposed class is manageable and the class device superior. The opinion expressly does not address how such difficulties would impact trial court evaluation of the predominance requirement. Given *Noel's* narrow scope, it remains to be seen how California courts will strike the balance at certification in the many instances where member-



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Background

The requirement that a class be ascertainable dates back to the early years of California class action jurisprudence. In a seminal 1948 decision, the California Supreme Court rejected a proposed class of persons who had waited in line for tickets to the prior year's Rose Bowl, because members of the class could not be ascertained. In the intervening 70 years, the Supreme Court and intermediate California appellate courts promulgated competing tests for determining whether a proposed class was ascertainable. Some courts had required that the class proponent show a realistic means for identifying class members as a prerequisite to certification. Others had fo-

cused on whether the proposed class was defined by objective criteria sufficient to allow the court and recipients of class notice to determine whether a particular person was in the class.

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

The *Noel* Opinion

Noel presented the claims of a proposed class of California purchasers of a \$59.99 inflatable outdoor pool, with plaintiff alleging that a picture on the packaging misled purchasers as to the pool's size. The trial court denied certification, holding in part that plaintiff had not shown the class was ascertainable due to his failure to present any evidence as to how purchasers of the pool could be identified. Plaintiff appealed, arguing that such evidence was not relevant to ascertainability, but could be presented after a class was certified, if needed to formulate a class notice program. The intermediate appellate court affirmed, noting the risk of jeopardizing the due process rights of absent class members if they were not notified of the class proceedings.

The California Supreme Court reversed, in an opinion that surveyed the split in California and federal law before aligning with the federal view represented by *Mullins*. Citing *Mullins*, the court held that to be ascertainable, the class must be defined by objective criteria. The court rejected classes defined by subjective criteria, such as class members' state of mind, and fail-safe classes defined by reference to the elements of the underlying claims.

The Supreme Court declined, however, to require plaintiffs to show a feasible means of identifying class members as a prerequisite to certification. Noting the limited scope of its review, the court explained that trial courts may consider whether class members can be readily identi-

fied in assessing other requirements for certification, including whether the proposed class would be manageable if certified and superior to alternatives. The court expressly did not reach how concerns as to identifying class members might affect the predominance analysis, and instead remanded for further trial court proceedings.

Going Forward

The California Supreme 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 a class action, just as it would in an individual action.

Proof of the connection between defendant's challenged conduct and putative class members is critical in even the most

garden-variety class action involving purchases at brick-and-mortar establishments. It can be dispositive in cases where there is no direct connection between class members and defendant — for example, where the product at issue is sold through a variety of retail channels, rather than by defendant, or where the class claims involve an indeterminate subset of users of an online service or platform.

The *Noel* opinion reserves a defendant's right to raise these issues in opposing class certification — for example, by arguing that individualized issues

predominate, that the class is not manageable, and that the class device is not a superior means of adjudicating the dispute. The opinion also should permit the early dismissal of class action complaints that are premised on subjective or “fail-safe” class definitions. The question going forward is whether certification criteria developed in the context of Rose Bowl tickets and inflatable outdoor pools can be effectively applied to the varying and ever-increasing tide of putative class claims presented to California courts.

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