

Litigation Alert

July 13, 2017

Key Points

- The U.S. Court of Appeals for the 2nd Circuit joined the 6th, 7th, 8th and 9th Circuits in expressly declining to adopt an “administrative feasibility” requirement for plaintiffs seeking to certify a class under Federal Rule of Civil Procedure 23 (“Rule 23”). In doing so, the 2nd Circuit departed from the approach adopted by the 3rd, 4th, and 11th Circuits.
- While the 2nd Circuit’s opinion prevents defendants from opposing class certification based on an independent “administrative feasibility” requirement, the ruling does not prohibit defendants from raising similar challenges under Rule 23’s enumerated requirements.
- The 2nd Circuit’s opinion adds another voice to the circuit split regarding whether Rule 23’s ascertainability requirement requires proof of administrative feasibility at the class certification stage, increasing the likelihood of Supreme Court review.



The 2nd Circuit Clarifies that Administrative Feasibility Is Not a Requirement for Class Certification

On July 7, in *In re Petrobras Securities*, the 2nd Circuit declined to adopt an independent “administrative feasibility” requirement for class certification under Rule 23. In so holding, the 2nd Circuit joined the 6th, 7th, 8th and 9th Circuits, and expressly disagreed with the 3rd Circuit, which has taken the lead in holding that class action plaintiffs must satisfy a “heightened ascertainability” requirement by showing that there is an administratively feasible mechanism to determine whether an individual meets the class definition. The 2nd Circuit ruled that class action plaintiffs may satisfy the ascertainability requirement by showing that class membership may be determined using objective criteria.

Background

During December 2014 and January 2015, a group of Petrobras’s investors filed a series of putative class actions against Petrobras and related defendants that were eventually consolidated. Plaintiffs alleged defendants engaged in a conspiracy to grossly inflate the prices of Petrobras’s bids and kickback the excess funds to Petrobras’s executives and co-conspirators.

In February 2016, the District Court for the Southern District of New York certified two classes of Petrobras investors under Rule 23(b)(3)—one class asserting claims under the Securities Exchange Act

of 1934 and the other class asserting claims under the Securities Act of 1933. On August 2, 2016, district court proceedings were stayed pending resolution of defendants' interlocutory appeal of the district court's order certifying the two classes. On appeal, Defendants argued *inter alia* that the class definitions failed to satisfy the "heightened" ascertainability requirement, which requires proof of administrative feasibility because it is not clear whether each investor acquired its securities in a domestic transaction. According to defendants, the 2nd Circuit's 2015 opinion in *Brecher v. Republic of Argentina* endorsed the administrative feasibility requirement.

The 2nd Circuit's Opinion

On appeal, the 2nd Circuit rejected Petrobras's argument, holding that plaintiffs may satisfy the ascertainability requirement implicit in Rule 23 by showing "objective criteria that are administratively feasible" and that "identifying members would not require a mini-hearing on the merits of the case." The court concluded that both class definitions satisfied these requirements because class membership could be determined using objective criteria, namely whether an individual owned Petrobras securities and acquired them via a domestic transaction. The 2nd Circuit remanded the matter back to the district court for further proceedings.

The 2nd Circuit claimed that its decision in *Petrobras* is not inconsistent with its prior ruling in *Brecher*. In *Brecher*, plaintiffs did not meet the ascertainability requirement because they failed to set the outer boundary of class membership using objective criteria. According to the 2nd Circuit, *Brecher's* references to "administrative feasibility" and "mini-hearings" were "not strictly part of the holding" and were "not intended to create an independent element of the ascertainability test; rather, that language conveyed the *purpose* underlying the operative requirements of definiteness and objectivity" (emphasis in original).

The 2nd Circuit reasoned that requiring plaintiffs to show administrative feasibility at the class certification stage would upset the "careful balance of competing interests" codified in Rule 23's express requirements. A separate feasibility requirement would be duplicative of Rule 23's requirement that district courts consider the likely difficulties in managing a class action. Moreover, such a requirement would encroach upon the Rule 23(b)(3) requirements that class treatment be the best way to adjudicate the action and that classwide claims predominate over individualized inquiries (commonly known as the "superiority" and "predominance" requirements).

Thus, the 2nd Circuit departed from the approach taken by the 3rd Circuit and instead joined the 6th, 7th, 8th and 9th Circuits in holding that proof of administrative feasibility is not required to obtain class certification.

Takeaways

While the 2nd Circuit's ruling precludes class action defendants in the 2nd Circuit from challenging class certification based on an independent administrative feasibility requirement, the decision leaves the door open for defendants to make similar arguments through Rule 23's enumerated requirements. In particular, the decision recognized that defendants retain the ability to challenge certification by arguing that administrative difficulties in determining class membership would create significant difficulties in

maintaining a class action, that a class action would not be a superior method of resolving the dispute and that individualized issues may predominate over common ones.

The 2nd Circuit's decision further highlights the circuit split on this divisive issue in class action jurisprudence and further increases the likelihood that the Supreme Court will weigh in.

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