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Appellate Division Rejects Ascertainability as a Class-Certification Requirement in New Jersey State Courts

On May 13, in *Daniels v. Hollister Co.*, No. A-3629, 13T3, 2015 N.J. Super. Lexis 77 (App. Div. May 13, 2015), the New Jersey Appellate Division addressed for the first time whether a plaintiff was required to demonstrate "ascertainability" of class members to be granted class certification. Ascertainability, as held by some federal courts discussing Rule 23 of the Federal Rules of Civil Procedure (FRCP), is embedded in FRCP 23, in addition to the four express requirements for class certification (numerosity, commonality, typicality, and adequacy of representation). Ascertainability requires a court to determine whether the members of a class can be identified ("ascertained") based on current and objective criteria. In a strong condemnation of the concept as antithetical to the purpose and history of class actions, the Appellate Division affirmed the grant of class certification, holding that while class certification presupposes the existence of a properly defined class, New Jersey does not require ascertainability as a condition for class certification in low-value consumer transactions.

Background

Plaintiff Vincent Daniels, individually and on behalf of a class, brought suit against Hollister Co., a clothing retailer, for breach of contract. In or around December 2009, Hollister conducted a promotion in which it provided a $25 gift card to customers purchasing at least $75 of merchandise in stores or online. Plaintiff claimed that Hollister voided all outstanding gift cards on January 30, 2010, although the gift cards allegedly possessed "no expiration date." Hollister acknowledged that some cards did not have an expiration date, but claimed to have had in-store signs stating the "$25 gift card expires 1/30/10" while the promotion ran, and that it sent e-mails to some customers regarding the upcoming expiration date. Hollister admitted that approximately $3,000,000 worth of $25 gift cards were voided on January 30, 2010.

The Court's Analysis

On appeal from the trial court's order granting class certification, the Appellate Division was required to assume the truth of plaintiff's alleged facts. The Appellate Division first reviewed *Rule* 4:32-1, which sets forth the requirements for maintaining a class action, and reiterated that this rule is to be applied liberally in favor of class certification. *Id.* at *4. Citing the underlying purpose and policy behind class actions, the court emphasized that in the context of consumer transactions, "a class action should lie unless it is clearly infeasible." *Id.* at *5.

Hollister asserted that *Rule* 4:32-1 has an implicit element of ascertainability, just as FRCP 23 does. *Id.* at *6. Additionally, Hollister argued its due process rights would be violated because it would not be able to test the class's parameters. Hollister also maintained that ascertainability was a part of New Jersey's judicial fabric, and to the extent it was not, Hollister urged the court to recognize and apply it in the present matter.

The appellate court categorically rejected all of Hollister's arguments. First, the court reasoned that the New Jersey Supreme Court has not recognized an implicit ascertainability requirement in *Rule* 4:32-1, examining their recent decisions discussing class certification, in particular *Lee v. Carter-Reed Co.*, 203 N.J. 496 (2010), *Int'l Union of Operating Eng'rs. Local No. 68 Welfare Fund v. Merck & Co.*, 192 N.J. 372 (2007), and *Iliadis v. Wal-Mart Stores, Inc.*, 191 N.J. 88 (2007). *Id.* at *9. The Appellate Division observed that these cases, which discuss class certification in detail, failed to even mention the word ascertainability. *Id.* at *9-10 n.3. Thus, the court concluded ascertainability was not a requirement.

Second, the court explained that the doctrine of ascertainability in the federal courts has been adopted only by a few circuits, and the viability of the doctrine in the Third Circuit, where New Jersey sits, is uncertain. *Id.* at *10-11. The court found that

ascertainability imposed a substantial burden on class certification in consumer transactions involving minimal damages. Notably, although questioning whether the doctrine would be viable in New Jersey at all, the court declined to address the application of ascertainability in cases other than low-value consumer class actions.

Third, the court admonished Hollister for its argument that it would be difficult to identify class members. The court found ascertainability to be "particularly misguided" when difficulties in identifying class members are "a consequence of a defendant's own acts or omissions." *Id.* at *14. The court noted that the record reflected Hollister was able to identify and cancel over $3,000,000 worth of gift cards. *Id.* at *17. The court suggested that even if ascertainability was relevant at the class certification stage, the specter of "extensive and individualized fact-finding or 'mini-trials'" in identifying class members is a concern more appropriate for the claims administration stage. *Id.* at *16-17. Adopting Hollister's argument would ultimately permit defendants to escape responsibility, according to the court.

Significantly, the court concluded that "ascertainability" did not further the underlying goals of the court rules?- "the fair and efficient administration of justice." *Id.* at *14. The court emphasized the policy underlying the necessity of the class-action mechanism?- to allow a large number of individuals to band together to remedy a potential wrong and allow them to have equal footing against a corporate adversary. *Id.* at *16. In other words, the "class action was intended to empower the 'smaller guy.'" *Id.*

As an interesting procedural note, the court stated in a footnote that "we will hereafter, as a general matter, liberally indulge applications for leave to appeal" orders granting or denying class certification in three situations: (1) when a denial of class status effectively ends the case, (2) when the grant of class status raises the stakes so substantially that a defendant would feel "irresistible pressure" to settle, and (3) when permitting leave to appeal will "lead to a clarification of a fundamental issue of law." *Id.* at *2.

Conclusion

Class actions, particularly those adjudicating consumer claims that individually may be of minimal value, continue to receive protection from New Jersey's courts. Neither the size of the class nor difficulties identifying its members will be sufficient to avoid class certification in New Jersey state court. Although the court seems to have limited its holding to low-value consumer claims, it is yet to be seen how New Jersey courts will apply ascertainability to other types of claims. For now, this important difference between state and federal class action practice is likely to be a factor in plaintiffs' decisions about where to file cases and defendants' decisions whether to remove cases to federal court. In addition, the court's endorsement of motions for leave to appeal orders granting or denying class certification motions should lead to another viable option for class action litigants.