

ARTICLE: Tips for Minding the "Ascertainability" of a Class

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Body

While most federal circuits agree that Rule 23 of the Federal Rules of Civil Procedure imposes an implied "**ascertainability**" requirement for **class** certification, a growing circuit split has emerged regarding the level of scrutiny courts should apply when determining if that requirement has been met. In this article, we discuss the circuit split and the impact of the Second Circuit's recent decision on the issue in *In re Petrobras Securities Litigation*, and we provide guidance on what **class** action litigants may expect going forward.

The Circuit Split

Courts in the First, Third, Fourth, and Eleventh Circuits apply a "heightened" **ascertainability** requirement. In these circuits, courts require (1) that the **class** can be defined by objective criteria *and* that (2) determining who is in the **class** is "administratively feasible." See *Byrd v. Aaron's Inc.*, [784 F.3d 154, 163 \(3d Cir. 2015\)](#). As explained by the Third Circuit in *Carrera v. Bayer Corp.*, [727 F.3d 200 \(3d Cir. 2013\)](#), in order to be "administratively feasible," "identifying **class** members [must be] a manageable process that does not require much, if any, factual inquiry." *Id.* at 307-8. In contrast, courts in the Sixth, Seventh, Eighth, and Ninth Circuits (and recently, the Second Circuit, discussed below) require only that the **class** can be defined by objective criteria, not that the plaintiff also make a showing of "administrative feasibility."

The Third Circuit has provided three main reasons for its "heightened" approach: (1) to mitigate administrative burdens; (2) to safeguard the interest of **class** members who may want to opt out; and (3) to protect the due process rights of defendants, i.e., their ability to challenge whether **class** members are actually part of the **class**. Courts that reject the Third Circuit's approach have reached the conclusion that "Rule 23's enumerated criteria"--namely, the "manageability" and "predominance" requirements--"already address the interests that motivated the Third Circuit," rendering the "administrative feasibility" requirement unnecessary. See, e.g., *Briseno v. Conagra Foods, Inc.*, [844 F.3d 1121, 1127 \(9th Cir. 2017\)](#).

The Second Circuit's Recent Decision in *Petrobras* In *Petrobras*, the Second Circuit joined the "growing consensus" of circuits rejecting the Third Circuit's "heightened" approach. 2017 WL 2883784, at *9 (2d Cir. July 7, 2017). The plaintiffs in *Petrobras* sought to certify two **classes** of purchasers who acquired securities of Petrobras,

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a Brazilian company. The defendants argued the classes were not "ascertainable" because Petrobras' securities did not trade on a domestic exchange, requiring the court to conduct individual inquiries of the domesticity of each class member's transaction--which the defendants asserted was not "administratively feasible." *Id.* at *5, *6.

The Second Circuit rejected the defendants' argument, determining that there is no "freestanding" requirement of "administrative feasibility" under Rule 23. *Id.* at *8. In so holding, the court reasoned that such a requirement would "duplicate" Rule 23's manageability requirement, with one important difference: Manageability is "comparative in nature," requiring the court to weigh administrative feasibility against the benefits of the class action mechanism, while a separate administrative feasibility requirement would be an "absolute standard" considered in a "vacuum." *Id.* at *11. This heightened scrutiny would also "encroach[] on territory belonging to the predominance requirement," another "comparative standard" under which courts weigh whether a proposed class would "require highly individualized determinations of member eligibility." *Id.* The court thus concluded that ascertainability is a "modest threshold requirement" that "will only preclude certification if a proposed class definition is indeterminate in some fundamental way," i.e., if it fails to offer "a clear sense of who is suing about what." *Id.* at *12.

Ultimately, however, while the court determined that the proposed classes were sufficiently ascertainable using objective criteria, they did not satisfy the predominance requirement because the individual inquiries of class members' transactions were not subject to class-wide evidence of domesticity. *Id.* at *16.

Conclusion

In light of the sharp and growing circuit split over whether a heightened ascertainability standard applies at class certification, the issue appears destined for Supreme Court review. Much will depend on how much deference the Court gives to the language of Rule 23 and its direction to engage in a comparative analysis when determining whether to certify a class, as opposed to the policy concerns enumerated by the Third Circuit. For now, class action litigants should be mindful of the heightened ascertainability requirement in certain circuits. However, even when bringing suit in a circuit that has rejected the heightened approach, litigants should assess whether the "administrative feasibility" of their proposed class (or lack thereof) may nonetheless affect their ability to satisfy the manageability or predominance requirements of Rule 23.

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