

The Eleventh Circuit Precludes “Administrative Feasibility” but Provides a Path Forward for Defendants Opposing Class Certification in Consumer Class Actions

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On February 2, 2021, the U.S. Court of Appeals for the Eleventh Circuit became the latest court of appeals to take a side in the circuit split over whether Rule 23 imposes an “administrative feasibility” requirement on class-action plaintiffs. In a published opinion in [Cherry v. Dometic Corporation](#) (the “Opinion”), the Eleventh Circuit vacated a denial of class certification that was based on the plaintiffs’ failure to demonstrate that identification of class members would be a “manageable process that does not require much, if any, individual factual inquiry.” The Eleventh Circuit joined other appellate courts that have held that the text of Rule 23 does not support a freestanding “administrative feasibility” requirement. The Opinion, however, does not preclude defendants from presenting robust defenses to class certification based on difficulties in identifying class members. The Opinion provides guidance on how defendants can reframe “administrative feasibility” arguments under the Rule 23 manageability requirement. Defense counsel can also frame such arguments in terms of lack of predominance and ascertainability.

THE OPINION

This matter arose as a putative class action alleging that refrigerators manufactured by the defendant for use in recreational vehicles were defective. Plaintiffs sought to certify a class of all persons who purchased certain specified refrigerator models in nine states. The district court, relying on an unpublished decision by the Eleventh Circuit that has frequently been cited by class-action defendants, held that a class could not be certified because plaintiffs failed to demonstrate administrative feasibility. Specifically, the court found that plaintiffs had not come forward with evidence of any method that could be used to identify putative class members that had purchased the allegedly defective refrigerators.

The Eleventh Circuit vacated the district court’s denial of class certification, holding that there is no textual support in Rule 23 for an administrative feasibility requirement. The court recognized, however, that arguments about administrative feasibility may be framed in terms of the Rule 23(b)(3) “manageability” requirement. The manageability

analysis involves a balancing test focused on “whether a class action will create relatively more management problems than any of the alternatives.” The court counseled that “[i]f there appear to be unusually difficult manageability problems. . . a district court has discretion to insist on details of the plaintiff’s plan for notifying the class and managing the action” or “decertify a certified class that turns out to be unmanageable.” While the court also cautioned that a lack of administrative feasibility “will rarely, if ever, be dispositive” on the question of the appropriateness of class certification, the court noted that “its significance will depend on the facts of each case.”

DEFENDING CLASS CERTIFICATION IN THE ELEVENTH CIRCUIT

In light of the Eleventh Circuit’s determination that there is no standalone administrative feasibility requirement, defense counsel will need to frame arguments relating to difficulties in identifying class members under other elements of the Rule 23 analysis and develop a strong factual record to substantiate their position.

Rule 23(b)(3) Manageability. As the Opinion recognizes, there may be circumstances where the infeasibility of determining class membership makes a class action sufficiently unmanageable that it is preferable to resolve disputes in individual cases. Defendants should heed the Opinion’s comments on class notice, and press plaintiffs to come forward with a credible plan to notify class members. A plaintiff’s failure to do so may provide a strong basis to oppose certification in the first instance or to later move to decertify. Because the manageability inquiry requires a balancing test, arguments about why class treatment would be unmanageable should be accompanied by arguments regarding why it would be feasible—and even preferable—to resolve disputes on an individual basis (*e.g.*, because the claim is predicated on a statute that provides prevailing plaintiffs with attorney fees or large statutory awards).

Rule 23(b)(3) Predominance. Rule 23(b)(3) provides that a class cannot be certified where individualized issues predominate. Arguments predicated on lack of predominance can be effective in circumstances where there is no common evidence that can be used to determine class membership (or liability) on a class-wide basis and fact-intensive inquiries are therefore required. In many cases, defense counsel can present a strong predominance argument by developing an extensive factual record, supported by detailed expert testimony, demonstrating that there is significant variability with respect to an element of the class definition, such as the context or content of a communication to a putative class member, and individualized determinations would therefore be required simply to discern the membership of the putative class.

Ascertainability. The Opinion recognizes that Rule 23 contains an unwritten “ascertainability” requirement, meaning that class membership is “capable of being determined.” This typically means that objective criteria can be used to identify class members. Plaintiffs may be unable to satisfy this requirement where, for example, class membership includes “fail safe” elements (*i.e.*, where a merits determination is required to determine membership) or where there is a list of potential class members but no objective criteria that can be employed to determine which members did or did not experience a violation.

Although the Eleventh Circuit’s Opinion forecloses one avenue of argument for defense counsel, problems in identifying putative class members can be addressed through creative arguments under other Rule 23 elements.

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