



CLASS ACTION LITIGATION



REPORT

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CERTIFICATION

CLASS DEFINITIONS

Recent class certification rulings make clear that federal courts will generally not tolerate overbroad, vague, subjective or “fail-safe” class definitions, say attorneys John H. Beisner, Jessica D. Miller, and Jordan M. Schwartz in this BNA Insight.

The authors urge defendants facing a class action to carefully assess whether the proposed class satisfies the explicit requirements of Rule 23, and whether the class definition passes muster under recent ascertainability jurisprudence.

Ascertainability: Reading Between the Lines of Rule 23

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While federal courts continue to consider the express prerequisites of Rule 23 in assessing class-certification proposals, more and more decisions are turning on an “implied” requirement of Rule 23: that a proposed class must be ascertainable. As the California Court of Appeal recently recognized, the “require[ment that] a class definition [be] ‘precise, objective and presently ascertainable’ ” “goes to the heart of the question of class certification.”¹ Moreover, be-

cause a court can generally determine whether a proposed class is ascertainable without resort to discovery, a growing number of courts are willing to dispose of class actions at the pleading stage if the class definition is improper on its face.²

Charter Corp. v. Learjet Inc., 2009 U.S. Dist. LEXIS 35184, at *12 (S.D. Ill. Apr. 27, 2009) (similar); *Lyell v. Farmers Group Inc. Employees’ Pension Plan*, 2008 U.S. Dist. LEXIS 107332 (D. Ariz. Dec. 3, 2008) (“[I]n order to maintain a class action, the class must be adequately defined and *clearly ascertainable*.”) (emphasis added).

² See, e.g., *John v. National Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007) (“where it is facially apparent from the pleadings that there is no ascertainable class, a district court

¹ *Sevidal v. Target Corp.*, 189 Cal. App. 4th 905, 919 (Cal. Ct. App. 2010) (citation omitted); see also, e.g., *Cunningham*

The California Court of Appeal recently articulated the parameters of the ascertainability requirement in *Sevidal v. Target Corp.*³ There, the plaintiff asserted claims for, *inter alia*, consumer fraud and unjust enrichment under California law and sought to certify a class of California consumers who purchased certain items from the defendant seller that were misidentified as made in the United States.⁴ The trial court found that the proposed class of California consumers was unascertainable and impermissibly overbroad because it would be too difficult to identify the class members. In affirming the trial court's ruling, the California Court of Appeal delineated the contours of the implied requirement of ascertainability. According to the court, "[a]scertainability is achieved by defining the class in terms of objective characteristics and common transactional facts making the ultimate identification of class members possible."⁵ Therefore, ascertainability is satisfied when class members "may be readily identified without unreasonable expense or time by reference to official [or business] records."⁶ The court went on to highlight the purpose of this requirement, which is "to give adequate notice to class members" and "to determine after the litigation has concluded who is barred from relitigating."⁷

Applying these principles, the appellate court affirmed the lower court's ruling that the proposed class was not ascertainable. The court determined that substantial evidence supported the trial court's finding that the putative class members "could not be 'readily identified' because Target did not maintain, or have access to, records identifying the individuals who purchased a product with an erroneous country-of-origin designation."⁸

Although plaintiff had argued that the proposed class was ascertainable because "Target ha[d] already identified specific products which fall within this definition," and "ascertaining the members that fit within the class definition" would merely require "identifying the consumers who purchased those products," the Court of Appeal rejected this argument, agreeing with the trial court that Target's records did not "reflect only the items which were misidentified"—and more importantly—that the company could not determine "who purchased [the misidentified] products."⁹ The plaintiff also argued that the proposed class was "specific enough such that purchasers could identify themselves."

may dismiss the class allegation on the pleadings"); *Sanders v. Apple Inc.*, 2009 U.S. Dist. LEXIS 6676 (N.D. Cal. Jan. 21, 2009) (striking class allegations on ascertainability grounds); *Brazil v. Dell*, 585 F. Supp. 2d 1158, 1167 (N.D. Cal. 2008) (same); *Barasich v. Shell Pipeline Co.*, 2008 U.S. Dist. LEXIS 47474, at *13-14 (E.D. La. June 19, 2008) (same); *In re Vioxx Prod. Liab. Litig.*, No. MDL 1657, 2008 WL 4681368, at *10 (E.D. La. Oct. 21, 2008) (lack of ascertainability "alone is sufficient to warrant striking the Plaintiffs' class allegations on the pleadings").

³ 189 Cal. App. 4th 905 (Cal. Ct. App. 2010).

⁴ *Id.* at 911.

⁵ *Id.* at 918 (internal quotation marks and citation omitted).

⁶ *Id.* at 919 (internal quotation marks and omitted, alteration in original).

⁷ *Id.* (internal quotation marks and citation omitted).

⁸ *Id.*

⁹ *Id.* at 920 (emphasis added).

The court once again disagreed, reasoning that because the proposed class included consumers "who were never exposed to the country-of-origin information" many putative class members "would, by definition, have no way of knowing whether [they] purchased an item when it was misidentified, and thus would have no way of knowing whether [they are] member[s] of the class."¹⁰ As the court explained, the fact that some class members may be easily identifiable "does not mean that the class as a whole [is] ascertainable."¹¹ Because the putative class members could not be easily and objectively identified, the Court of Appeal affirmed the trial court's denial of class certification.

Recent case law addressing ascertainability generally focuses on three problematic types of classes: (1) the overbroad class; (2) the difficult-to-identify class; and (3) the fail-safe class. Below, we discuss recent developments with respect to each of these three categories.

The Overbroad Class

Over the last several years, multiple courts have found that a proposed class that includes all users of a product or service—irrespective of whether the proposed class members suffered any injury or have any complaints about the product or service—is not ascertainable.¹² As some courts have explained, this is so because such a class encompasses a substantial number of class members who lack standing to recover on the asserted claims.¹³

The overbreadth principle was at play in *Sevidal*, because nearly 80 percent of the proposed class purchased an item without viewing the allegedly deceptive country-of-origin information.¹⁴ As a result, the vast majority of the proposed class members were never "deceived by the alleged false or misleading advertising."¹⁵ Accordingly, the Court of Appeal reasoned, even if Target's conduct was "unlawful" under California's Unfair Competition Law, the proposed class was overly broad—and therefore uncertifiable—because "the essence of [plaintiff's] allegation [was] based on an alleged false misrepresentation to which the majority of class members were never exposed."¹⁶

The California Court of Appeal says the requirement that a class definition be precise, objective, and presently ascertainable "goes to the heart" of the question of class certification.

A number of other federal and state court rulings are in accord, finding that a proposed class definition that

¹⁰ *Id.* at 921.

¹¹ *Id.*

¹² See *Konik v. Time Warner Cable*, 2010 U.S. Dist. LEXIS 136923, at *33 (C.D. Cal. Nov. 24, 2010).

¹³ See *McDonald v. Corr. Corp. of Am.*, 2010 U.S. Dist. LEXIS 122674, at *8 (D. Ariz. Nov. 4, 2010).

¹⁴ 189 Cal. App. 4th at 921.

¹⁵ *Id.* at 925 (internal quotation marks and citation omitted).

¹⁶ *Id.* at 928.

includes uninjured members is overbroad and patently uncertifiable.¹⁷ For example, in *Oshana v. Coca-Cola Co.*, the U.S. Court of Appeals for the Seventh Circuit upheld the district court's decision not to certify a proposed class of Illinois residents alleging consumer-fraud and unjust-enrichment claims based on their purchase of fountain Diet Coke. There, the named plaintiff alleged that Coca-Cola "tricked consumers into believing that fountain diet coke" did not contain artificial saccharin and sought to certify a class of all individuals in Illinois who had purchased the fountain soda.¹⁸ The court denied class certification because "[m]embership in [the] proposed class required only the purchase of a fountain Diet Coke." As such, the court found that the proposed class "could include millions who were not deceived and thus h[ad] no grievance"¹⁹ and the class was impermissibly overbroad.²⁰

This principle was also illustrated in *Sanders v. Apple Inc.*,²¹ where plaintiffs, who purchased Apple's 20-inch Aluminum iMac, brought a putative class action against the defendant manufacturer, asserting fraud and warranty claims. Plaintiffs sought to certify a class of "[a]ll persons or entities located within the United States who own[ed] a 20-inch Aluminum iMac."²² Before addressing the explicit prerequisites to class certification, the court considered the question of ascertainability and determined that the proposed class was overly broad. Specifically, because the proposed class definition included individuals who did not actually purchase their iMac, individuals who were not subject to the allegedly deceptive advertisements and individuals who were not injured by defendant's conduct, the class was overbroad.²³ Accordingly, the court denied certification.²⁴

An overly broad class definition also doomed the proposed class in *In re McDonald's French Fries Litigation*.²⁵ There, the plaintiffs commenced a putative class action against McDonald's for alleged violation of state consumer-protection statutes, breach of warranty, and unjust enrichment, alleging that they were deceived by representations regarding the potato products' ingredients.²⁶ Plaintiffs sought to certify a nationwide class of "[a]ll persons residing in the United States . . . (i) who purchased Potato Products from McDonald's restaurants . . . and (ii) who at the time of purchase had been medically diagnosed with celiac disease" ²⁷ Noting that the proposed class was not limited to persons who necessarily saw or knew of the alleged representations, the court declared that the class was "overinclusive" and denied class certification.²⁸

Not all courts have embraced this argument, however.²⁹ In *In re Whirlpool*, for example, the court certified a class of Ohio residents who purchased allegedly defective front-loading washing machines.³⁰ Plaintiffs asserted claims for negligent design, negligent failure to warn, tortious breach of warranty and violation of the Ohio Consumer Sales Practice Act, based on the machine's alleged propensity to develop mold.³¹ Whirlpool argued that the proposed class was overbroad because it consisted of "many plaintiffs whose washers have not manifested any mold problems."³² But the court summarily rejected this argument, finding that "[w]hether any particular plaintiff has suffered harm is a merits issue not relevant to class certification."³³ The *Whirlpool* ruling is currently on appeal to the Sixth Circuit, which may provide further insight into the vitality of the "overbreadth" doctrine.

The Difficult-to-Identify Class

Another problematic group of cases involves the difficult-to-identify class. This problem arises where determining membership in the proposed class would be administratively burdensome. As one MDL court put it: a proposed class must be "sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member."³⁴

In *Solo v. Bausch & Lomb*, for example, the plaintiffs filed a class action suit against the defendant manufacturer of contact lens solution. Plaintiffs asserted claims for, *inter alia*, consumer fraud and unjust enrichment.³⁵ Plaintiffs alleged that they suffered economic losses by paying for a defective contact lens solution and discarding it per the defendant's directive after a recall, because defendant did not fully reimburse plaintiffs for the defective and discarded product.³⁶ Plaintiffs sought to certify classes of people who purchased the product "between September 1, 2004, and April 10, 2006, and 'lack[ed] full reimbursement for any quantity discarded following [the] recall.'" ³⁷ The court refused to certify the proposed classes on the ground that it "would have to make thousands of fact-intensive inquiries" to determine who had been adequately reimbursed and who "lack[ed] full reimbursement."³⁸ Among other things, the court recognized, it would "need to determine whether an individual purchased MoistureLoc between

¹⁷ See, e.g., *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513-14 (7th Cir. 2006); *Davenport v. Interactive Communs. Int'l*, 2010 Cal. App. Unpub. LEXIS 6364, at *19-22 (Cal. Ct. App. Aug. 9, 2010).

¹⁸ 472 F.3d at 509.

¹⁹ *Id.* at 513-14.

²⁰ *Id.* at 514.

²¹ 2009 U.S. Dist. LEXIS 6676 (N.D. Cal. Jan. 21, 2009).

²² *Id.* at *25.

²³ *Id.* at *28.

²⁴ *Id.* at *28-30.

²⁵ 257 F.R.D. 669 (N.D. Ill. 2009).

²⁶ *Id.* at 670.

²⁷ *Id.* at 671.

²⁸ *Id.* at 671-72.

²⁹ See, e.g., *Daffin v. Ford Motor Co.*, 458 F.3d 549, 553 (6th Cir. 2006) (rejecting overbreadth argument in putative class action involving alleged defect in vans because whether some class members did not experience any problems with their accelerator would constitute an improper "inquiry into the merits of [the] suit"); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 2010 U.S. Dist. LEXIS 69254, at *4-5 (N.D. Ohio July 12, 2010) (certifying class and finding that overbreadth argument implicates "a merits issue not relevant to class certification").

³⁰ 2010 U.S. Dist. LEXIS 69254, at *4.

³¹ *Id.*

³² *Id.* at *4-5.

³³ *Id.*

³⁴ *Solo v. Bausch & Lomb Inc.*, 2009 U.S. Dist. LEXIS 115029, at *13 (D.S.C. Sept. 25, 2009); see also, e.g., *Oshana*, 472 F.3d at 513.

³⁵ 2009 U.S. Dist. LEXIS 115029, at *8-9.

³⁶ *Id.*

³⁷ *Id.* at *13-14.

³⁸ *Id.* at *18.

September 1, 2004, and April 10, 2006 . . . how much was purchased and at what price, whether the individual discarded the solution, when it was discarded, and how much was discarded.”³⁹ Given these significant administrative burdens to determining class membership, the court agreed with the defendant that the class was not ascertainable and therefore denied class certification.⁴⁰

A similar problem resulted in the denial of class certification in *Cole*.⁴¹ There, plaintiff residents and property owners filed a class action lawsuit against the defendant as a result of pollution that was allegedly caused by mining conducted by defendants. Plaintiffs asserted claims for nuisance and sought to certify a medical monitoring class and a property owner class.⁴² While the court denied certification of both proposed classes, it found that the property owner class was particularly problematic with respect to ascertainability. The proposed property-owner class was defined as “[a]ll individuals and entities who owned or had an interest in real property in the Class Area as of May 14, 2001.”⁴³

Although plaintiffs conclusorily contended that class members could be identified “through examination of deeds,” the court found that reliance on these deeds was insufficient for purposes of ascertainability.⁴⁴ The court pointed to the example of one of the named plaintiffs, who sought to represent commercial property owners in the proposed class, but who did not live or own property in the affected area.⁴⁵ This plaintiff was an owner of a bank that owned property in the class area.⁴⁶ However, an examination of deeds would not have revealed this named plaintiff’s membership in the class.⁴⁷ The court reasoned that “[i]f examination of deeds does not pick up the interests claimed by even named plaintiffs, it could not be expected to suffice to identify the interests of other putative class members who ‘owned or had an interest in real property’ in the Class Area.”⁴⁸ Because it would be “extremely difficult, applying plaintiffs’ suggested [class definition], to identify the potential class members having any interest, recorded or unrecorded, in real property . . . identification of members of the proposed class would be administratively unfeasible.”⁴⁹ Accordingly, plaintiffs’ class definition was inadequate, and the motion for class certification was denied.

Class definitions that turn on subjective criteria, such as a class member’s mental state, also fall within the difficult-to-identify category because these definitions make it impractical and administratively burdensome to determine whether an individual is part of the class.⁵⁰

Courts have determined that these kinds of class definitions “yield [too much] indeterminacy and imprecision” to satisfy the ascertainability requirement.⁵¹ As one court faced with a subjective class definition put it, merely determining who is in the class would be a “Sisyphian task” that “would be a burden on the court and require a large expenditure of valuable court time.”⁵²

For example, in *Biediger v. Quinnipiac Univ.*, plaintiffs sought to certify two groups of female athletes whose rights under Title IX were allegedly violated by Quinnipiac University.⁵³ Although both proposed class definitions contained subjective elements, the court focused on the second group, which was defined as “women who have not and will not enroll at Quinnipiac because of Quinnipiac’s allegedly discriminatory athletic programming.”⁵⁴ The court agreed with the defendant that this proposed class was not ascertainable given the subjective criteria by which class membership would have to be determined.⁵⁵ The court reasoned that “[u]nlike the first subclass, which [was] composed of a definite and identifiable pool of possible members (at its broadest, all current, prospective, and future female athletes at Quinnipiac), the second subclass could conceivably be every person who decided, or who will decide, not to attend Quinnipiac.”⁵⁶ Because the court would have to determine each potential class members’ motivations in deciding not to attend Quinnipiac, the proposed class was too “amorphous and unwieldy” to satisfy the requirement of ascertainability and certification was denied.⁵⁷

Some courts have rejected arguments like those described above on the ground that “[e]ach individual class member need not be identifiable at the class certification stage.”⁵⁸ These courts have held that a class is ascertainable as long as class members “can be identified when judgment is rendered.”⁵⁹ In addition, other courts have taken it upon themselves to modify class definitions rather than deny motions for class certification.⁶⁰ For example, in *Chakejian*, the plaintiff alleged violations of the Fair Credit Reporting Act based on letters from the defendant that allegedly contained misstatements and misrepresentations regarding class

by reference to objective criteria,” class definitions must “avoid subjective standards (e.g., a plaintiff’s state of mind) or terms that depend on resolution of the merits (e.g., persons who were discriminated against).”

³⁹ *Id.*
⁴⁰ *Id.* at *14.
⁴¹ *Cole*, 256 F.R.D. at 693.
⁴² *Id.*
⁴³ *Id.* at 696.
⁴⁴ *Id.*
⁴⁵ *Id.*
⁴⁶ *Id.*
⁴⁷ *Id.* at 696-97.
⁴⁸ *Id.*
⁴⁹ *Id.*
⁵⁰ See, e.g., *Oshana v. Coca-Cola Co.*, 255 F.R.D. 575, 580-81 (N.D. Ill. 2005), *aff’d*, 472 F.3d 506 (7th Cir. 2006); *Rios v. Marshall*, 100 F.R.D. 395, 404 (S.D.N.Y. 1983); see also Manual for Complex Litigation (4th) § 21.222, at 270 (while “[a]n identifiable class exists if its members can be ascertained

by reference to objective criteria,” class definitions must “avoid subjective standards (e.g., a plaintiff’s state of mind) or terms that depend on resolution of the merits (e.g., persons who were discriminated against).”

⁵¹ *Conigliaro v. Norwegian Cruise Line*, No. 05-21584-CIV-ALTONAGA/Turnoff, 2006 U.S. Dist. LEXIS 95576, at *20 (S.D. Fla. Aug. 31, 2006).

⁵² *Simer v. Rios*, 661 F.2d 655, 669 (7th Cir. 1981).

⁵³ 2010 U.S. Dist. LEXIS 50044 (D. Conn. May 20, 2010).

⁵⁴ *Id.* at *10.

⁵⁵ *Id.* at *13.

⁵⁶ *Id.*

⁵⁷ *Id.* at *14.

⁵⁸ *Guadiana v. State Farm Fire & Cas. Co.*, 2010 U.S. Dist. LEXIS 129588, at *12 (D. Ariz. Dec. 7, 2010) (rejecting argument that “class is not administratively feasible or ascertainable because of the unique characteristics of each leak” in class action arising out of defendant insurance carrier’s alleged breach of insurance contract); *Chana Friedman-Katz v. Lindt & Sprungli (USA) Inc.*, 270 F.R.D. 150, 154-55 (S.D.N.Y. Nov. 19, 2010) (“the Court views the small number of individualized factual determinations that must be made here in ascertaining membership in the class as entirely manageable”).

⁵⁹ *Guadiana*, 2010 U.S. Dist. LEXIS 129588, at *12.

⁶⁰ See, e.g., *Chakejian v. Equifax Info. Servs.*, 256 F.R.D. 492, 497 (E.D. Pa. 2009).

members' credit data.⁶¹ Plaintiff sought to certify a class of [a]ll consumers in . . . Pennsylvania to whom . . . Defendant sent a letter *substantially similar* to the Letter attached to the Amended Complaint.⁶² Although the court agreed that the proposed class definition was vague, it chose to modify the proposed class definition rather than deny class certification. According to the court, the letter at issue in the case was received in response to a dispute solely involving public records information. The allegations only pertained to information from public records such as bankruptcies, liens, and judgments.⁶³ Therefore, the court concluded that "the defendant's objection that the class definition [was] vague because it d[id] not define 'substantially similar' c[ould] be ameliorated by amending the class definition as follows":

All consumers in the Commonwealth of Pennsylvania to whom, beginning two years prior to the filing of the Amended Complaint and continuing through the resolution of this action, in response to a dispute [over a public record (including, but not limited to a bankruptcy, lien, or judgment)], Defendant sent a letter substantially similar to the Letter attached to the Amended Complaint as Exhibit A.⁶⁴

The Fail-Safe Class

A third category of ascertainability cases concerns fail-safe classes. Recent court decisions make it clear that a class is not ascertainable where the named plaintiffs propose a class definition that incorporated a legal conclusion (e.g., all consumers who were wrongfully denied. . .).⁶⁵ This is so because identification of class members would require the court to make legal determinations and conclusions that are closely intertwined with the claims of the class members.⁶⁶ In addition, fail-safe classes set up a situation in which class members are only bound by a judgment that finds the defendant liable.⁶⁷ After all, if the class is defined as everyone who was wronged by the defendant and the defendant prevails at trial, then it turns out that nobody was in the class to begin with—and thus nobody is bound by the ruling.⁶⁸ For these reasons, an increasing number of federal and state courts have rejected fail-safe defini-

tions, recognizing that they "turn [] Rule 23 on its head."⁶⁹

The challenges posed by a fail-safe class were at issue in *Kirts v. Green Bullion Financial Services LLC*.⁷⁰ There, the plaintiffs sought to certify a class of "[a]ll individuals who submitted jewelry to [defendant] and were damaged because [defendant] broke its promise and advertised procedures to handle the jewelry with a high standard of care, or fairly appraise the jewelry, or provide an adequate return period."⁷¹ To ascertain membership in this proposed class, the court would have needed to "determine with respect to each potential member (1) whether the individual owned the jewelry in question, (2) whether the individual sent jewelry to [defendant], and (3) whether [defendant] committed any of the misconduct described with respect to that individual's submitted jewelry."⁷² As the court explained, under this fail-safe class definition, "the Court would essentially have to make a determination that [defendant] is liable to an individual before it could conclude that the individual is a member of the class."⁷³ Because such a determination would impermissibly intertwine class certification with the merits of the case—thereby "defeat[ing] the [very] purpose of conducting a class action"—the court held that the class was unascertainable and denied plaintiffs' motion for class certification.

Similarly, in *Brazil v. Dell*,⁷⁴ the plaintiff consumers filed a putative class action, alleging that the defendant advertised false discounts for its computer products. Plaintiffs sought to certify a class of California citizens who purchased products that "Dell *false* advertised as discounted."⁷⁵ According to the defendant, the plaintiffs proposed an impermissible "fail-safe" class because membership in the class was contingent on a finding that defendant was liable.⁷⁶ The court agreed and found that the proposed class could not be "ascertained" because the court would have to determine whether defendant "falsely advertised," a legal question that implicated the merits of the underlying claims.⁷⁷ Because the proposed class was not ascertainable, the court granted defendant's motion to strike the class allegations.⁷⁸

unfair because the result of resolution of membership question is that class members "win or are not in the class").

⁶⁹ *Heffelfinger v. Elec. Data Sys. Corp.*, 2008 U.S. Dist. LEXIS 5296, at *42 (C.D. Cal. Jan. 7, 2008); see also, e.g., *Kirts v. Green Bullion Fin. Servs., LLC*, 2010 U.S. Dist. LEXIS 92381 (S.D. Fla. Aug. 3, 2010); *Eversole v. EMC Mortgage Corp.*, No 05-124-KSF, 2007 U.S. Dist. LEXIS 38892, at *15 (E.D. Ky. May 29, 2007); *Bostick v. St. Jude Med. Inc.*, No 03-2626, 2004 WL 3313614, at *15-16 (W.D. Tenn. Aug. 17, 2004); cf. *Alvarez v. Hyatt Regency Long Beach*, 2010 U.S. Dist. LEXIS 99281, at *5 (C.D. Cal. Sept. 21, 2010) (explaining that definition that consists of "all non-exempt employees of the Defendants' hotel . . . is not a prohibited 'fail safe' putative class").

⁷⁰ 2010 U.S. Dist. LEXIS 92381.

⁷¹ *Id.* at *20.

⁷² *Id.* at *20-21.

⁷³ *Id.* at *21.

⁷⁴ 585 F. Supp. 2d at 1158.

⁷⁵ *Id.* at 1167.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* Plaintiffs subsequently moved to certify a new class consisting of "[a]ll persons or entities who are citizens of the State of California who on or after March 23, 2003, purchased via Dell's Web site Dell-branded products advertised with a

⁶¹ 256 F.R.D. at 494.

⁶² *Id.* at 496 (emphasis added).

⁶³ *Id.* at 497.

⁶⁴ *Id.*

⁶⁵ See *Brazil v. Dell Inc.*, 585 F. Supp. 2d 1158, 1167 (N.D. Cal. 2008); *Agostino v. Quest Diagnostics Inc.*, 256 F.R.D. 437, 479 (D.N.J. 2009) ("A court must reject a proposed class or subclass definition that 'inextricably intertwines identification of class members with liability determinations.'"); *In re Vioxx Prod. Liab. Litig.*, No. MDL 1657, 2008 WL 4681368, at *9 (E.D. La. Oct. 21, 2008) (highlighting that it is a "basic tenet of class certification [that] a court may not inquire into the merits of the case at the class certification stage") (citation omitted).

⁶⁶ See *Demmick v. Celco P'ship*, 2010 U.S. Dist. LEXIS 94041, at *17-18 (D.N.J. Sept. 8, 2010) (modifying proposed fail-safe definition, which turned on "[w]hether proposed class members were charged more than what was agreed to in the contract[,] [thereby implicating] a central issue in this case").

⁶⁷ See, e.g., *Canez v. King Van & Storage*, 2010 Cal. App. Unpub. LEXIS 9687, at *7-8 n.8 (Cal. Ct. App. Dec. 7, 2010).

⁶⁸ See *Genenbacher v. CenturyTel Fiber Co. II*, 244 F.R.D. 485, 488 (C.D. Ill. 2007) (explaining that fail-safe classes are

A similar result obtained in *Barasich v. Shell Pipeline Co.*⁷⁹ There, the plaintiffs, commercial fishermen, filed suit against the defendant oil companies, contending that defendants negligently failed to prevent oil from leaking from their tanks or pipelines during Hurricane Katrina. The plaintiffs claimed that defendants' alleged negligence resulted in a loss of income and other economic damages for commercial fishermen.⁸⁰ Plaintiffs sought to certify a class of "[a]ll commercial fishermen whose oyster leases were contaminated by oil discharge during Hurricane Katrina **due to the negligence of defendants.**"⁸¹ Before addressing the explicit prerequisites to class certification, the court considered the question of ascertainability.⁸² The court found the class definition inadequate for two reasons: (1) it had no geographic limits; and (2) identification of class members would require the court to inquire into the merits of each member's claim because of the phrase, "due to the negligence of defendants."⁸³ Based on plaintiffs' inadequate class definition and other Rule 23 deficiencies, the court refused to certify the proposed class.

At the same time, however, some courts have rejected ascertainability arguments challenging the "fail-safe" nature of a proposed class⁸⁴ or have chosen to modify a

represented former sales price (i.e., a "Slash-Thru" price or a "Starting Price") as indicated and set forth [in attached schedules, with limited exclusions]." *Brazil v. Dell Inc.*, C-07-01700 RMW, 2010 WL 5387831, at *2 (N.D. Cal. Dec. 21, 2010). The court certified the class, determining that "[u]nlike earlier proposed class definitions, th[e] [revised] class definition does not require a legal determination in order to ascertain class membership." *Id.*

⁷⁹ 2008 U.S. Dist. LEXIS 47474 (E.D. La. June 19, 2008).

⁸⁰ *Id.* at *4-5.

⁸¹ *Id.*

⁸² *Id.* at *13.

⁸³ *Id.* at *13-14.

⁸⁴ See, e.g., *LaBrenz v. Am. Family Mut. Ins. Co.*, 181 P.3d 328, 336 (Colo. App. 2007) (holding that the "'fail-safe' concept is inapplicable here" because "the proposed class is not framed as a legal conclusion, but in more neutral terms as insureds whose non-PPO, PIP-related medical services were paid under Explanation Code 41 and health care providers whose

purported fail-safe class definition instead of denying a motion for class certification.⁸⁵ For example, in *Kamar v. Radio Shack Corp.*,⁸⁶ the Ninth Circuit affirmed the trial court's certification of a class of California employees who, for a certain period, worked a Saturday meeting as instructed or a split-shift without receiving the full amount of mandated premium pay. Radio Shack argued that the district court erroneously certified a fail-safe class.⁸⁷ The Ninth Circuit agreed with the trial court that the class definition was not defective, reasoning that the class was limited to "employees within the reporting time and split-shift classifications," and did not "actually distinguish[] between those who may and those who may not ultimately turn out to be entitled to premium pay."⁸⁸ The court thus concluded that the proposed class was not defined in terms of defendant's liability—and moreover—that if a class member was not aggrieved by Radio Shack, the defendant would be shielded from liability to that person.⁸⁹

Conclusion

In sum, recent class certification rulings have made it clear that federal courts will generally not tolerate overbroad, vague, subjective or "fail-safe" class definitions. Thus, defendants faced with a class action proposal should carefully assess not only whether the proposed class satisfies the explicit requirements of Rule 23, but also whether the class definition passes muster under recent ascertainability jurisprudence.

medical bills were reduced under Explanation Code 41"); *Dale v. DaimlerChrysler Corp.*, 204 S.W.3d 151, 178-80 (Mo. Ct. App. 2006) (rejecting fail-safe argument because "the class definitions do not make any merit determinations").

⁸⁵ See, e.g., *Perez v. First Am. Title Ins. Co.*, 2009 U.S. Dist. LEXIS 75353, at *25-26 (D. Ariz. Aug. 12, 2009) (rejecting defendant's argument that defining class in terms of liability necessitates denial of class certification because court has power to redefine class and the "defect is . . . rather easily cured by recasting the definition in terms of Plaintiffs' liability theory").

⁸⁶ 375 Fed. Appx. 734 (9th Cir. 2010).

⁸⁷ *Id.* at 736.

⁸⁸ *Id.*

⁸⁹ *Id.*

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