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NJ Decision Makes State Court Cozier For Class Actions

By **Martin Bricketto**

Law360, Jersey City (May 18, 2015, 9:43 PM ET) -- A recent New Jersey appellate decision snubbing controversial class identification requirements when certifying low-value consumer class actions will further drive plaintiffs to keep such suits in state court and poses due process problems for defendant companies, some attorneys say.

The state Appellate Division in **a precedential opinion on May 13** backed certification in a consumer class action against clothing retailer Hollister Co. over expired gift cards, rejecting the company's arguments that the court should follow the lead of the Third Circuit and weave the ascertainability doctrine — which concerns whether class members can be readily identified using objective criteria — into certification decisions.

Drawing a plaintiff-friendly line in the sand, the court not only said ascertainability can't play a role in the certification of consumer class actions that involve lower dollar amounts, but it also openly doubted that the doctrine should play any role in state court and contended that it was being “exploited by defendants in unsuitable cases to evade liability.”

The decision reinforces a perception that defendants have the deck stacked against them in state court, according to Christopher J. Dalton, a shareholder with Buchanan Ingersoll & Rooney PC.

“It's going to certainly encourage plaintiffs in so far as possible to keep all class actions that they can in New Jersey state court,” he said.

The suit targets Hollister for voiding \$25 gift cards that didn't have an expiration date, according to the May 13 opinion. The company had distributed the cards in December 2009 as a promotion to customers who spent \$75 or more, and about \$3 million worth of the cards were eventually voided.

Siding with named plaintiff Vincent Daniels, the panel noted that New Jersey Court Rule 4:32-1, which covers the requirements for maintaining a class action, is supposed to be liberally construed in favor of certification.

Hollister had argued that ascertainability was an implicit requirement in the rule and that Daniels couldn't meet it. The company said that, without ascertainability, it couldn't test class membership, absent class members couldn't opt out, and “the preclusive effect of any judgment will be unknowable and unenforceable,” according to the opinion.

However, Rule 4:32-1 has never been interpreted to require that a class be ascertainable to win certification, the panel found.

“We find that this federal doctrine as urged here imposes far too heavy a burden on class

certification where the purported injuries to class members are so minimal as to preclude the likelihood they would be individually asserted," the court said.

The opinion creates a kind of "due process lite" that doesn't really allow defendants to challenge claims of class membership, according to Dalton. He added that court gave short shrift to legitimate concerns such as the class definition's inclusion of consumers who tossed the gift cards because they were told they had expired.

"Saying we don't have to worry about how class members will be identified is just kicking the can down the road," Dalton said.

After the Third Circuit's 2013 decision in *Carrera v. Bayer Corp.* toughened the standard for ascertainability, there was already a sense that class action plaintiffs were trying to avoid federal court, but last week's decision tips the scales to an extreme degree, suggested Alida Kass, chief counsel of the New Jersey Civil Justice Institute.

"This went from the federal court being somewhat hostile territory for class actions that maybe don't meet the requirements for class certification to just opposite ends of the spectrum, from very rigorous scrutiny on whether the class is ascertainable to no scrutiny," she said, referring to the difference between state and federal courts.

Bringing a class action in the state just became even easier, added Marcus Rayner, president of the NJCJI.

"If this is allowed to stand, I think it's 'Katy, bar the door' for class actions in New Jersey," he said.

However, the appellate court said in the opinion that class actions have historically been a vehicle to look out for "the smaller guy." Rebuffing the ascertainability doctrine holds true to that mission, according to John Keefe of Keefe Bartels.

"This decision is indeed a good result for [New Jersey] consumers who serve as the little guy to level the playing field and keeps the courthouse doors open for adjudication of these claims without fictitious barriers of judicial creation not contemplated by our rules," Keefe said.

Ascertainability has been taken too far at the federal level, and recent Third Circuit decisions even suggest a possible rollback of the judge-made doctrine, according to Bruce D. Greenberg, a member of Lite DePalma Greenberg LLC.

"[The decision] is certainly important at the moment where the Third Circuit has really allowed ascertainability to become the altar on which we sacrifice consumer class actions," he said.

And while the decision may be helpful to plaintiffs, its impact will be narrower than defense-side advocates contend, according to Henry Wolfe of the The Wolf Law Firm LLC.

There have long been incentives to filing in state court, and most class actions involving such over-the-counter transactions will still find their way to federal court under the federal Class Action Fairness Act, which allows for removal when aggregate class damages are \$5 million or more and where at least one defendant and one plaintiff are based in different states, Wolfe said.

Still, home state and local controversy exceptions in CAFA can allow class actions with specific characteristics to remain in state court no matter the damages, and the decision otherwise means worsened stakes for businesses that might not be able to survive a multimillion-dollar judgment, even if it happens to be less than \$5 million, according to

Jeffrey J. Greenbaum, who chairs Sills Cummis & Gross PC's class action practice group.

"I don't think it's the last word," Greenbaum said. "I think something this important will have to come from the highest court, and I suspect it will be appealed."

One potential benefit to both defendants and plaintiffs is a footnote in the decision stating that the appellate court going forward will "liberally indulge" bids to appeal certification decisions, which aren't appealable as of right, when denial of class status essentially ends the case, when certification places heavy pressure on the defendant to settle or when allowing an appeal will help clarify a fundamental area of the law.

Those standards will probably result in the court granting interlocutory appeals on most certification decisions, which makes sense given the impact of such rulings, according to Greenbaum.

"A decision to grant or deny class certification is outcome-determinative from a practical perspective and should get interlocutory review before the costs go out of control and people are forced to make settlement decisions without a full explanation of their legal rights," he said.

The case is Vincent Daniels v. Hollister Co., case number A-3629-13, in the Superior Court of New Jersey, Appellate Division.

— Editing by Kat Laskowski and Ben Guilfoy.

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