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Antitrust Takeaways From The 2nd Circ. Petrobras Ruling

By **Eric Kroh**

Law360, Fort Wayne (July 28, 2017, 7:35 PM EDT) -- The Second Circuit recently decertified two investor classes claiming Brazilian oil giant Petrobras concealed billions of dollars in bribes and kickbacks in the latest circuit court ruling to weigh in on ascertainability, a contentious issue that strikes to the core of antitrust class actions.

The three-judge panel **vacated** and remanded a lower court finding that the investors satisfied the predominance requirement of class certification, ruling that the district court's analysis failed to address how potential class members could provide common proof that they purchased the Petrobras securities in domestic transactions.

Importantly, in its ruling, the Second Circuit declined to subject the class members to a heightened ascertainability standard that would require a putative class to show at the class certification stage that there is an administratively feasible way to identify class members.

U.S. District Court Judge Nicholas G. Garaufis, sitting by designation on the panel, said in rejecting an administrative feasibility requirement articulated by the Third Circuit, the Second Circuit joined a "growing consensus" that includes the Sixth, Seventh, Eighth and Ninth circuits.

Although there is some debate about whether there is a true circuit split on the issue, the U.S. Supreme Court has been asked to weigh in on administrative feasibility, and the high court's decision on the question would have profound implications for antitrust class actions.

"The ascertainability doctrine is very relevant to antitrust cases because if you can't ascertain who the purchasers were, you can't ascertain who was impacted by a potential antitrust violation," Jeffrey S. Jacobson, a partner with Kelley Drye & Warren LLP, said.

The Second Circuit's decision in the Petrobras case continued an ongoing conversation among the circuit courts about whether groups seeking class certification must provide an administratively feasible way to ascertain who is a member of the class, such as production of a receipt or other record.

Imposing such a test at the class certification stage, the appeals court said, would upset the careful balance of Rule 23, which directs courts to consider in class certification decisions whether collective action is superior to other methods of adjudication, and whether class questions predominate. It is enough for district courts to consider whether a proposed class is defined using objective criteria, the Second Circuit said.

"Ascertainability does not directly concern itself with the plaintiffs' ability to offer proof of membership under a given class definition, an issue that is already accounted for in Rule 23," Judge Garaufis said.

The Petrobras opinion dispelled the notion that the Second Circuit had endorsed a heightened ascertainability standard in 2015's *Brecher v. Republic of Argentina*, according to Whitney E. Street, a partner with Block & Leviton LLP. In *Brecher*, the court **said** a class is ascertainable when "defined by objective criteria that are administratively feasible and when identifying its members would not

require a mini-hearing on the merits of each case."

The Petrobras decision, however, clarified that administrative feasibility "was never intended to be a separate, stand-alone aspect of the ascertainability assessment," Street said. Rather, "the concept of 'feasibility' was intended to explain the rationale for why class membership must be based on objective criteria."

Although the Petrobras litigation does not involve antitrust claims, the Second Circuit's ruling has already been recognized as a significant one by antitrust class plaintiffs.

In a case before the Eleventh Circuit, Delta Air Lines Inc. and AirTran Airways Inc. have **appealed** a district court's certification of a class of some 28 million passengers alleging the carriers conspired on checked bag fees, arguing in part that Brecher and other rulings show the passengers must establish that identifying class members would be administratively feasible.

Counsel for the passengers, in a **letter** to the court earlier this month, brought the Eleventh Circuit's attention to the Petrobras ruling, noting that the Second Circuit rejected the airlines' interpretation of Brecher and joined several other circuit courts in declining to require a showing of administrative feasibility at the class certification stage.

The Delta case is exactly the kind of antitrust class action that might be most affected by an administrative feasibility requirement. While large corporations tend to keep detailed records of transactions that would presumably pass the administrative feasibility test, consumers often do not, or their receipts are not thorough enough.

Such a rule may not derail pay-for-delay class litigation brought by wholesalers against a pharmaceutical company, but it could torpedo large consumer class suits at the class certification stage. In the Delta case, for example, passenger receipts do not list who paid the bag fees at issue in the suit.

House lawmakers have already **passed** legislation, the Fairness in Class Action Litigation Act of 2017, that would impose an explicit administrative feasibility requirement on class certifications. The Senate Judiciary Committee has not yet acted on the bill, and previous versions of the legislation introduced in prior Congresses have not met with success.

If legislators do not act on the bill, the Supreme Court could impose a heightened ascertainability standard if it chooses to take up the question during its next term. In April, Conagra Brands Inc. **asked** the high court review a Ninth Circuit decision to uphold certification of a class that claims "100 percent natural" labels on Wesson cooking oil are deceptive. The Ninth Circuit's January ruling rejected an administrative feasibility requirement for class certification.

In its petition for certiorari, the food giant said the Ninth Circuit decision deepened a circuit split on whether a court may certify a class absent an administratively feasible way to identify class members.

The Second Circuit's Petrobras decision undermines ConAgra's argument, as the company claimed that Brecher placed the court among the Third, Fourth and Eleventh circuits and opposing the Sixth, Seventh, and Ninth circuits on the issue. Although the Petrobras ruling explicitly aligns the Second Circuit with appeals courts that have declined to adopt an administrative feasibility requirement, it is unclear whether there is a circuit split in the first place, Jacobson said.

The facts were highly specific in the three Third Circuit cases in which the court supposedly articulated its stance on administrative feasibility, and if they were put before any other circuit court, it would likely rule the same way, Jacobson said. In those cases, much like the Petrobras, the Third Circuit ruled that the classes could not be certified because common issues did not predominate, he said.

"All the Third Circuit has done is to judge cases before it and agree that class certification is inappropriate in situations where the plaintiff did not have a reliable means of identifying class members," he said. "I really don't believe there is a circuit court in the country that would have decided any differently."

Taylor Washburn of Lane Powell PC said the high court justices may wait until the circuit courts have ruled on more cases before taking up the question of administrative feasibility to see if a clear circuit split emerges.

"It really would come down to whether you're seeing significant differences in outcomes between the circuits," Washburn said. "In that case, I think Supreme Court guidance would be necessary."

--Editing by Philip Shea and Katherine Rautenberg.

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