

Class Action Alert

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California Court Continues Ascertainability Trend, Denies Class Certification in Chipotle "Naturally Raised" Litigation

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Purveyors of mass-retail food products may have a new reason to rejoice this holiday season. On December 2, the U.S. District Court for the Central District of California, in *Hernandez v. Chipotle Mexican Grill, Inc.*, quietly issued a three-page In Chambers Order denying class certification in a false advertising action challenging Chipotle's claim that its products contain "Naturally Raised" meat. The class certification denial alone is notable given California's famously broad consumer protection laws. Even more significant is the court's reasoning, which seems to stem from the growing trend among federal courts of barring class certification on ascertainability grounds.

The *Chipotle* decision is the latest instance of an emerging obstacle for consumer class action plaintiffs: How to confront the often insurmountable task of reliably identifying disparate members of a proposed class where few, if any members, have documentary proof of their purchases. Earlier this year, the Third Circuit in *Carrera v. Bayer Corp.* held that in consumer fraud class actions, class certification should be precluded on ascertainability grounds where members of the proposed class are unlikely to have documentary proof of purchase (e.g., packaging or receipts) and no record of specific retail sales exists.

As the Third Circuit explained, ascertainability is "an essential prerequisite" of class certification that requires the class plaintiff to establish, by preponderance of the evidence, a reliable and administratively feasible method for objectively identifying persons belonging to the proposed class. In the context of mass-marketed retail products, a class plaintiff cannot establish ascertainability simply by relying on affidavits of absent class members or on retail records that fail to link individual purchasers to specific purchases. Where "individualized fact-finding or mini-trials will be required to prove class membership," the proposed class is not "administratively feasible" and class treatment is inappropriate. The Third Circuit noted that ascertainability is a threshold inquiry that the Court must consider before it even reaches the **Rule 23** factors. The *Carrera* decision was preceded by two other Third Circuit opinions – *Hayes* and *Marcus* – applying similar logic.

In *Chipotle*, the Central District of California applied similar reasoning but different legal principles to reach the same outcome. Because of supply shortages between 2008 and the present, Chipotle allegedly substituted "conventional" meat for "naturally raised" meat at certain restaurants, on certain dates, and in certain products. Based on these facts, the court denied class treatment on predominance and superiority grounds, rather than relying on the Third Circuit's ascertainability analysis. However, in doing so, the court based its reasoning on the absence of a reliable method for identifying legitimate class members.

First, the court determined that class treatment was improper because individual issues predominated regarding when class members ate at Chipotle, which Chipotle locations they patronized, and which meat-containing Chipotle products (if any) they purchased during their visits. As the court explained, these types of individual issues may not exist in cases where class members "could be expected to have records of the purchase...or to have retained the purchased item." By contrast, where "the dispute concerns a very low price transaction that neither the class members nor Chipotle maintain any specific record of" and where the alleged misconduct varies among products, locations, and time frames, the defendant must be allowed "some mechanism" for confirming or contesting the veracity of class members' claims. Credit card records, the court noted, would not be sufficient to identify which meat products a class member purchased in any given transaction.

Second, the court ruled that the class action mechanism would not be "fair and efficient" to class members or Chipotle for many of the same reasons. As the court explained, class members could not reliably list "every time they ate at Chipotle," including the date, specific location, and specific item purchased, during the preceding five-year class period. As a result, claimants would be forced to lie, guess, or not bother submitting a claim, which would harm both legitimate class members and Chipotle

because class funds would be given out "basically at random to people."

The *Chipotle* decision is an important development for companies selling high-volume, low-priced products that are frequently targeted by the plaintiffs' bar. Combined with the Third Circuit's ascertainability analysis, three new methods now exist for companies to defend themselves when faced with this type of attack. Perhaps even more importantly, this precedent serves as much-needed negotiating leverage for businesses attempting to reach pre-litigation resolutions to threatened class action lawsuits. With courts in highly trafficked class action jurisdictions like the Third Circuit and Central District of California having weighed in on the issue, this new class action obstacle appears to be a growing trend.